90-1844

No. .....

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

Petitioner,

vs.

TRUDY E. ALGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the jury may be instructed to base a determination of damages in a tort case on its own judgment of the "reasonableness" of the victim's adherence to a sincerely held religious belief, in this case the refusal by a Jehovah's Witness to accept a blood transfusion that might have saved her life.

2. Whether state law may require a tort victim to forgo exercise of a constitutional right, in this case the free exercise of religion, in order to reduce the damages that would otherwise have to be paid by a tortfeasor.

3. Whether the court of appeals erred in holding that the admission of irrelevant and prejudicial evidence regarding the controversial religious beliefs of a religious minority, which invited the jury to decide the case on an admittedly unconstitutional ground, was harmless error.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Southern Health Plan, Inc., d/b/a IPA Apple Plan, was an intervening plaintiff in the district court, but did not appear as a party in the court of appeals. Respondent's insurer, Michigan Mutual Insurance Company, provided representation to respondent in the courts below, but did not appear as a party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ray James Munn petitions for a writ of certiorari to review the decision of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 924 F.2d 568. The opinions of the district court (Pet. App. A40, A58) are reported at 730 F. Supp. 21 and 719 F. Supp. 525.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

On Christmas morning, 1986, petitioner Ray James Munn and his wife, Elaine Munn, both devout Jehovah's Witnesses, were driving south on a two-lane highway from their home in Memphis, Tennessee, to pick up her daughter in Clarksdale, Mississippi. There was a heavy fog. Travelling the other direction, respondent Trudy Algee grew impatient with the speed of the tractor-trailer truck in front of her, and pulled into the left lane to pass. Tr. 218-19, 223. By her own testimony, the fog was so dense that she could not see beyond the front of the truck when she started to pass. Tr. 222. At that point, she saw the headlights of the Munns' car through the fog, braked, went off the road, spun around, and crashed into the passenger side of the Munns' vehicle, where Mrs. Munn was sitting. Ray Munn sustained minor injuries. Elaine Munn suffered multiple fractures in the pelvic area, broken ribs, multiple bruises, abrasions and cuts on her body, a lacerated artery, a torn lung, and extensive internal bleeding and bruising. Tr. 318-19.

An ambulance arrived about 45 minutes after the accident and took the Munns to Tunica County Hospital. Mrs. Munn was later transferred to the Regional Medical Center in Memphis, Tennessee.

Upon arrival at the Regional Medical Center, the Munns advised the medical personnel that she was a Jehovah's Witness and could not accept blood transfusions. Under Jehovah's Witness beliefs, the Biblical instruction in *Acts* 15:29 to "abstain . . . from blood" absolutely precludes the acceptance of blood transfusions. In petitioner's own words at trial, taking blood "would be losing God's favor and eventually eternal life. . . . [T]hat is our Scripture belief." Tr. 105.[1] Doctors at the hospital strongly recommended that Mrs. Munn receive blood. Tr. 123. This presented Mrs. Munn with an agonizing issue of conscience. Should she adhere to her religious beliefs, thereby increasing the risk that she would die of her injuries? Or should she accept the transfusion, thereby violating her religious conscience and, according to her beliefs, risk eternal damnation?

Mrs. Munn refused the transfusion as long as she was physically able, and after she could no longer speak her husband continued to refuse on her behalf. Eight hours after the accident, Mrs. Munn died on the operating table. Although the evidence was conflicting,[2] the jury concluded that Mrs. Munn would have survived if

1. For an official statement of Jehovah's Witness teaching regarding blood, see Watch Tower Bible & Tract Society, *Jehovah's Witnesses and the Question of Blood* (1977). While many Jehovah's Witnesses believe, in accordance with the precept that God's commandments are in the best interest of His people, that medical evidence supports the wisdom of their stance against blood transfusions (see *id.* at 38-58), their position is ultimately based on Biblical interpretation, not medical evidence. See *id.* at 5 (emphasis in original) ("the stand taken by Jehovah's Witnesses is *above all a religious one*; it is a position *based on what the Bible says.*").

2. Dr. Earnest Payne, an internist who had treated Mrs. Munn for an unrelated medical problem prior to the accident, testified that, in his opinion, based on the severity of Mrs. Munn's injuries, she would have died even if she had received a blood transfusion. Tr. 233. Dr. Joseph Sapala, a forensic pathologist with 8 years' experience in emergency rooms, testified that in his opinion there was a 75% probability that Mrs. Munn would have died even if she had

she had taken the blood transfusion. Mrs. Munn, who had been a telephone operator with South Central Bell, was survived by her husband and her three children by an earlier marriage, aged seven, fourteen, and twenty.

Petitioner filed suit in the United States District Court for the Northern District of Mississippi under diversity jurisdiction, seeking damages for medical expenses, wrongful death, and related damages on behalf of himself and the children. Respondent admitted liability (Tr. 501), and the case went to the jury solely on the issue of damages.[3]

Respondent defended against the wrongful death claim on the basis of the common law "avoidable consequences" doctrine, which holds that "an injured plaintiff may not recover for damages that he did not take reasonable steps to avoid." Pet. App. A9 n.9. Pursuant to this theory, the jury was given the following special interrogatory:

> 3. Do you find that defendant has proved by a preponderance of the evidence that Elaine Munn's refusal of blood transfusions was unreasonable?

Tr. 667-68.[4] The judge instructed the jury that in answering this question, "you may consider that the blood transfusions were medically recommended, but you may also consider her religious beliefs

accepted blood transfusions. Tr. 316. This testimony was contested by two other medical witnesses, Drs. W. Alan Walker and Timothy Fabian, who opined that acceptance of transfusions would have saved Mrs. Munn's life. Tr. 390-91, 450.

3. The parties stipulated to damages of $10,411.67 for Mrs. Munn's medical expenses and $241.24 for petitioner's medical expenses (Tr. 513-14). The jury also awarded $10,000 (the sum suggested by defense counsel, Tr. 613) for Mrs. Munn's pain and suffering for the eight-hour period between the accident and her death.

4. The interrogatories are quoted in full at Pet. App. A33-A34.

and related teachings together with the known risks of blood transfusions if you find that to be a factor in her decision." Tr. 651-52.[5] The jury found Mrs. Munn's refusal of blood "unreasonable" (Tr. 668), and since they deemed the refusal 100% responsible for her death (*id.*), the jury absolved respondent of any damages for Mrs. Munn's death.

In the alternative, petitioner sought damages for the injuries Mrs. Munn would have sustained if she had accepted the blood transfusions. Petitioner argued that, given the serious nature of his wife's injuries, the accident would have "resulted in long term disability, pain and suffering, and future medical expenses" if she had taken the transfusions and had survived. Pet. App. A70. The district court would not allow this alternative theory to go to the jury, stating that there is no authority "for allowing recovery of purely hypothetical losses." *Id.* The court observed that petitioner's theory "is thwarted by the stark reality that these consequences were never actually suffered by the plaintiff's decedent" (*id.*).

Accordingly, as a result of Mrs. Munn's adherence to religious conviction, the jury awarded damages neither for the injury she actually suffered (death) nor for the injuries she would have suffered if she had acted "reasonably."

Petitioner argued that this application of the "avoidable consequences" doctrine violates the First Amendment by putting the tort victim to the choice of acting in violation of her religious belief or losing the right conferred by state law to obtain complete recovery for all harm which results from the wrongful conduct of the tortfeasor. The district court rejected this argument on the ground

5. During the jury instruction conference, petitioner's counsel urged the court to adopt an alternative instruction that would direct the jury to ask what a reasonable Jehovah's Witness would have done in Mrs. Munn's situation. Pet. App. A20.

that "requir[ing] one citizen to pay damages for the consequences of another's exercising her religious freedom would favor an establishment of religion in a way which seems constitutionally unsupportable" (Pet. App. A66).

In the course of trial, defense counsel was allowed, over objection (Tr. 126-27), to cross-examine petitioner about a number of controversial doctrines of Jehovah's Witnesses unrelated to the question of blood. Tr. 128-52. Defense counsel explained that "one of the factors [the jury] can consider [as to] the reasonableness of her decision is her religious belief. And I want to test that religious belief." Tr. 127. The trial judge agreed: "The jury is going to be called upon to determine the reasonableness of their beliefs considering their religion as one of the factors. So I think I would be in error if I, shall I say, short-circuited a searching cross-examination because the jury should know all the facts and circumstances around it." Tr. 127-28.

Accordingly, defense counsel elicited testimony from petitioner that showed, among other things, that Jehovah's Witnesses refuse to "do service to their country, like going to war"; that they will not salute the American flag; that they believe that everyone other than the Jehovah's Witnesses "will be eternally damned"; and that they believe that Jesus Christ returned to earth in 1914. Tr. 129-31. On petitioner's motion for a new trial, the district court held that this evidence was admissible to test the sincerity of the Munns' profession of the Jehovah's Witness faith. Pet. App. A55.

The Fifth Circuit affirmed. The court held that application of the avoidable consequences doctrine under these circumstances does not violate the First Amendment because "generally applicable rules imposing incidental burdens on particular religions do not violate the free exercise clause" (Pet. App. A11). The court disapproved the district court's "case-by-case approach" to determining the reasonableness of a religiously-motivated refusal to mitigate damages.

The court observed:

> the question of whether a jury decides to label such conduct as reasonable may depend upon its view of the religious tenet that motivated the plaintiff's failure to mitigate damages. . . .
>
> If the jury finds the religion plausible, it will more likely deem the conduct reasonable; on the other hand, if the particular faith strikes the jury as strange or bizarre, the jury will probably conclude that the plaintiff's failure to mitigate was unreasonable. . . . [T]he jury undoubtedly assesses the plaintiff's religion in reaching its conclusion. A strong case can be made that the first amendment forbids such an assessment.

Pet. App. A12-A13. The court, however, declined to order a new trial on this ground, stating that "Munn himself interjected religion into the case, seeking to explain his wife's conduct. Had he been prohibited from doing so, the jury undoubtedly would have deemed her decision unreasonable." *Id.* at A13. The court held that the reasonableness of the tort victim's conduct must be assessed under an "objective" standard, that is, without regard to the victim's personal religious opinions. *Id.* at A13 n. 12. Under this approach, "religion may not justify an otherwise unreasonable failure to mitigate." *Id.* at A10. According to the court, this approach "plainly violates neither the free exercise clause nor the establishment clause." *Id.* at A13 n.12.

The court of appeals also affirmed the portion of the district court's judgment holding that petitioner is not entitled to damages for the injuries that his wife would have suffered if she had accepted the blood transfusion. "It is not 'reasonably probable' that the described injuries to Mrs. Munn will occur; in fact, because she did not survive the accident, it is certain that they will *not* occur" (Pet. App. A14; emphasis in original). The court noted that "[t]he combined effect of this conclusion and the avoidable consequences doctrine is at least superficially harsh," since the decedent's family received neither actual nor hypothetical damages resulting from Mrs. Munn's injuries. Pet. App. A14 n.13. But the court ob-

served that this result "flows from Mrs. Munn's own behavior, which was deemed unreasonable by the jury." *Id.* at A18 n.16.

Finally, the court of appeals rejected petitioner's argument that the cross-examination on his religious beliefs regarding service to his country, saluting the flag, eternal damnation of non-Jehovah's Witnesses, and other controversial subjects was prejudicial error. The court agreed with petitioner that the testimony was "utterly irrelevant" both to the issue of Mrs. Munn's sincerity and to the reasonableness of her decision (Pet. App. A7 n.6),[6] but held that this was harmless error. *Id.* at A7-A9. The court concluded that the jury's award of only $10,000 for Elaine Munn's eight hours of pain and suffering was "not so small as to arouse suspicion as to the jury's motives" (*id.* at A8), that the jury's failure to award petitioner himself any damages for his pain and suffering "most likely reflects the relatively minor nature of his injuries" (*id.*), and that there was "no indication" that the jury's refusal to compensate the wrongful death beneficiaries was a result of "its possible distaste for Jehovah's Witnesses" (*id.* at A9).[7]

Judge Rubin dissented on the evidentiary issue. He characterized the cross-examination as a deliberate "appeal to the jury's religious prejudice and nationalism" (Pet. App. A33) that "[p]atently . . . *might* have affected" the jury's calculation of damages for pain and suffering, its view that her actions were unreasonable, and its

6. Judge Barksdale dissented from this holding. He would have held that the evidence was "relevant to the doctrine of avoidable consequences—the key issue at trial." Pet. App. A24.

7. Petitioner, who is black, also argued that respondent's use of her three peremptory challenges to exclude blacks from the jury, producing a jury with five whites and one black, was unconstitutional. See *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals rejected this argument on the ground that *Batson* does not apply to suits between private parties. Pet. App. A3 n.1. Petitioner does not raise the *Batson* issue here because the district court held that there had been no timely objection. Pet. App. A57.

"evaluation of conflicting testimony over whether transfusions would have saved her life." *Id.* at A34-A35 (emphasis in original). Given the inflammatory nature of the evidence, Judge Rubin charged that "Algee's lawyer deliberately threw the proverbial skunk of inadmissible evidence into the jury box. No amount of conjecture that the jury *might* not have smelled the stink can undo the odor that, even now, permeates the record." *Id.* at A39 (emphasis in original).

REASONS FOR GRANTING THE PETITION

Trudy Algee's admitted act of impatience and recklessness confronted Elaine Munn with a terrible decision. As a devout Jehovah's Witness, Mrs. Munn was committed by faith and conviction to "abstain from blood." But the doctors were telling her that without blood transfusions she would die. The question in this case is whether the state can enforce a rule of law under which an innocent victim who is faced with such a conflict between physical safety and religious conscience will be denied damages for the injuries to *both* physical condition *and* religious conscience if she makes the decision dictated by her religious faith.

Under the common law doctrine of avoidable consequences, the victim of a tort "is required to take reasonable steps to mitigate his damages." *Buras* v. *Shell Oil Co.*, 666 F. Supp. 919, 924 (S.D. Miss. 1987), quoted at Pet. App. A22. Victims are not required to take *all possible steps* to mitigate damages, but only "reasonable" steps. Under this doctrine, the common law courts recognize a wide variety of circumstances in which tort victims are entitled to refuse to take mitigating steps, on the ground that such a requirement would be a serious intrusion into their personal lives.[8] It is

8. We use the terminology of "refusing to mitigate" for convenience of expression, but it would be more accurate to say that the religious tort victim *does* mitigate damages by adopting a course of action that minimizes total losses according to her own scale of values. One can only call this a "refusal to mitigate" by ruling personal, non-material consequences out of the calculus. See page 20, *infra*.

not disputed that Mrs. Munn's refusal to accept a blood transfusion was an exercise of her religion as a Jehovah's Witness. Her decision may not seem "reasonable" to most of us, since most of us do not share the Witnesses' beliefs. But we contend that, where state law respects other personal decisions, it is unconstitutional for the state to brand Mrs. Munn's religiously-motivated decision as "unreasonable" and therefore illegitimate. Yet this is the holding of the courts below.

The district court and the court of appeals arrived at the same result by different paths. The district court instructed the jury to decide whether Mrs. Munn's decision was "unreasonable," according to their own standards of reasonableness. Finding Mrs. Munn's refusal of blood "unreasonable," the jury exonerated the defendant. The court of appeals affirmed on the ground that, as a matter of law, a religiously-motivated refusal to mitigate damages is *per se* unreasonable. According to the court, petitioner should not have been allowed to "interject[ ] religion into the case" (Pet. App. A13) because "religion may not justify an otherwise unreasonable failure to mitigate" (*id.* at A10). Both of these approaches are constitutionally flawed—the district court's because it allows the jury to decide whether adherence to a particular religious tenet is "reasonable," the court of appeals', because it arbitrarily excludes religious reasons from the class of personal reasons entitled to respect under the law. Petitioner contends that the state may neither require a tort victim to forgo constitutionally protected rights for the benefit of a tortfeasor nor subject the exercise of those rights to second-guessing by a jury. The state is required to accept the victim's adherence to a sincerely-held religious belief as within the class of acceptable reasons for refusing to mitigate.

This does not mean, as the court of appeals erroneously stated, that religious convictions would be given "a special exemption" or dispensation (Pet. App. A11). Contrast *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990). It simply means that sincere religious convictions must—as a matter of law—be accorded the same

respect given other strong personal reasons for refusing to mitigate. As we will demonstrate below, no other conclusion is consistent with this Court's precedents.

The refusal to mitigate damages on constitutionally protected grounds presents a recurring problem in the lower courts. See Note, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 Yale L.J. 1466 (1978) (hereinafter cited as "Yale Note"). The decision below, while not alone, conflicts with substantial authority, and illustrates the confusion of lower courts when confronted with this question. If not reviewed, the decision below, having the prominence of a federal appellate judgment, will undoubtedly spawn greater confusion and inspire other courts to follow its lead. This Court's guidance is needed to resolve the conflict and ensure that constitutional rights are properly protected in this context.

I. The Jury Must Not Be Allowed To Base A Determination Of Damages On Its Own Judgment Of The "Reasonableness" Of Adherence To A Sincerely Held Religious Belief

The district court submitted the question of the reasonableness of Mrs. Munn's conduct to the jury through a special interrogatory.[9] Since the only reason Mrs. Munn had for refusing the transfusion was that it would violate the tenets of her religion, the jury's only basis for answering the question was its assessment of the plausibility of the Witnesses' beliefs regarding blood. If one were convinced, with the Witnesses, that the acceptance of blood will lead to eternal damnation, then one would be hard pressed to disagree with Mrs. Munn's decision. To say that her decision was unreasonable is to say that a reasonable person would not be convinced by the teachings of the Jehovah's Witness religion. If the First Amend-

9. The constitutionality of this approach was thoroughly briefed, and the district court explained its reasoning in two published opinions. See Pet. App. A40-A72.

ment means anything, it is that civil authorities have no power to make such judgments.

The evidence presented to the jury regarding the reasonableness of Mrs. Munn's decision demonstrates that this inquiry intrudes deeply into questions of doctrinal interpretation. Specifically regarding the prohibition on the acceptance of blood transfusions, defense counsel attempted to denigrate the belief by showing that it was formally announced no earlier than 1945. Tr. 131-35. This discussion occupies four pages in the transcript of trial, and culminated in the question: "If, Mr. Munn, Christ has been ruling since 1914 through the Watchtower, then why was it that it wasn't until 1945, some 31 years later, that the Watchtower would have first publicized the condemnation of the use of blood?" *Id.* at 134. Similarly, defense counsel attempted to show that the Witnesses' belief that accepting a blood transfusion would lead to eternal damnation is inconsistent with their belief that "God is a forgiving God." *Id.* at 135. Obviously, these are issues of religious doctrine that no civil authority has competence to decide.

Moreover, defense counsel was permitted, over objection, to cross-examine petitioner more broadly about Jehovah's Witness beliefs unrelated to the question of blood transfusions, many of which sound bizarre to the unbelieving outsider. The district court ruled this evidence admissible on the ground that the jury "is going to be called upon to determine the reasonableness of [the Munns'] beliefs considering their religion as one of the factors" and that further information about Witness doctrines is part of the "facts and circumstances around it." Tr. 127-28. The apparent logic, as the court of appeals recognized (Pet. App. A6 n.5), is that if "the entire religion is unreasonable, any decision made in accordance therewith is *per se* unreasonable."

Allowing the state to brand particular religions or religious beliefs as "unreasonable" is deeply contrary to the principles of the First Amendment. James Madison, principal author of the Religion

Clauses, called it "an arrogant pretension" to treat "the Civil Magistrate [a]s a competent Judge of Religious truth." J. Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5, reprinted in an appendix to *Everson* v. *Board of Education*, 330 U.S. 1, 67 (1947). When a jury votes that adherence to Jehovah's Witness teachings is "unreasonable," that is what it does. Long ago this Court emphatically rejected the notion that juries may pass on the truth or falsity of religious claims:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

United States v. *Ballard*, 322 U.S. 78, 86 (1944). "Repeatedly and in many different contexts," this Court has "warned that courts must not presume to determine . . . the plausibility of a religious claim." *Smith*, 110 S. Ct. at 1604 (collecting cases). See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others").

Moreover, the approach of the district court is inherently prone to religious favoritism and majoritarian bias. Some religions will be familiar, and the jurors will be inclined to sympathize with an adherent who is faithful to them. Other religions, like the Jehovah's Witnesses, are commonly perceived as heterodoxical and threatening. Juries will be inclined to view them as "unreasonable." The district court's approach thus violated the Establishment as well as the Free Exercise Clause, for "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see Yale Note, *supra*, at 1482-85.[10]

10. In analogous contexts, other courts have held that it is unconstitutional to distinguish among religions for purposes of religious exemptions from requirements of medical care. See *Lewis* v. *Califano*, 616 F.2d 73 (3d Cir. 1980);

The court of appeals stated that "[a] strong case can be made" that the district court's approach violated the First Amendment by allowing the jury to base its judgment on its assessment of the plaintiff's religion. Pet. App. A13. The court held, however, that the error was of no consequence because petitioner "himself interjected religion into the case" and had he not, "the jury undoubtedly would have deemed [Mrs. Munn's] decision unreasonable." *Id.* The court concluded that petitioner had no right to have his wife's religious motivations considered at all. It was on this premise that the court reasoned that any error in the evaluation of those beliefs was harmless. In the next Section, we will demonstrate that the court of appeals' approach, like that of the district court, is unconstitutional.

II. A Tort Victim May Not Be Required To Forgo Exercise Of A Constitutional Right In Order To Reduce The Damages That Would Otherwise Have To Be Paid By A Tortfeasor

Rather than allow the jury to determine whether adherence to a religious belief is reasonable, the court of appeals adopted the so-called "objective" approach, under which "religion may not justify an otherwise unreasonable failure to mitigate." Pet. App. A10, A13 n.12. This means that, for purposes of the avoidable consequences doctrine, a religious reason must be treated as *per se* unreasonable, as a matter of law.[11] This holding both imposes an

Sherr v. *Northport-East Northport School Dist.*, 672 F. Supp. 81, 89-90 (E.D.N.Y. 1987); *Kemp* v. *Workers' Compensation Dep't*, 65 Or. App. 659, 672 P.2d 1343 (1983).

11. Later in the opinion, the court used the term "objective" in a different sense, as referring to the standard of reasonableness that should be applied by the jury. Pet. App. A20-A22. The court made clear, however, that the proper approach in its view is to take the question of reasonableness out of the hands of the jury when the plaintiff's refusal to mitigate is based on religious considerations. Pet. App. A22 n.20.

unwarranted penalty on the exercise of a constitutional right and discriminates against religion by excluding it from the class of acceptable personal reasons for refusing to mitigate. In so doing, the decision misconstrues this Court's recent decision in *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990), and eviscerates a long line of this Court's cases, beginning with *Sherbert* v. *Verner*, 374 U.S. 398 (1963), which were expressly reaffirmed in *Smith*. In the discussion that follows, we will demonstrate (a) that the holding of the court below discriminates against religious claims; (b) that this burdens the exercise of the constitutional right; (c) that this reflects a misunderstanding of this Court's cases; and (d) that the decision below conflicts with decisions of other lower courts in analogous contexts.

A. By excluding religion from the class of acceptable motivations for refusal to mitigate, the holding below discriminates against religion

As already noted, the avoidable consequences doctrine requires only that the tort victim take "reasonable" steps to mitigate damages. Under this standard, the courts—including the courts of Mississippi[12]—recognize as legitimate a host of personal reasons for refusing to mitigate. Because the tortfeasor's conduct often confronts the victim with "a choice of evils" (*Ellerman Lines* v. *The President Harding*, 288 F.2d 288, 290 (2d Cir. 1961) (Friendly, J.)), "[i]njured parties are accorded wide latitude in deciding which measures to pursue in dealing with their injuries." 2 M. Minzer, *et al.*, *Damages in Tort Actions* § 16.21, at 16-31 (1991).

12. Mississippi courts follow general principles of law concerning avoidable consequences. See *City of Jackson* v. *Keane*, 502 So. 2d 1185, 1187 (Miss. 1987); *Vining* v. *Smith*, 213 Miss. 850, 58 So. 2d 34, 38 (1952). The court below noted that "Mississippi law allows a court to permit a jury to consider personal attributes in determining reasonableness." Pet. App. A23 n.20.

A leading treatise observes that

> Courts are . . . reluctant to require, as a matter of law, that injured parties submit to a serious intrusion into their personal, family, business or religious lives in order to minimize damages. Accordingly, an injured party has been found to have acted reasonably in refusing to obtain a higher education in order to obtain better employment; in refusing to undergo an abortion; in refusing to stay overnight with a stranger; in refusing to move a place of business or to reestablish it in the event of destruction; in refusing to lose weight; in refusing an unsatisfying, menial job; and in refusing to submit to medical treatment violating his religious principles.

Id. at 16-37 to 16-38 (citing cases; footnotes omitted).[13] See, *e.g.*, *Hegler* v. *Board of Education*, 447 F.2d 1078, 1081 (8th Cir. 1971) (plaintiff may not be required to take job in another state); *Baker* v. *Baltimore & O. R.R.*, 502 F.2d 638, 644 (6th Cir. 1974) (plaintiff may not be required to obtain a college education); *Black* v. *School Committee*, 365 Mass. 197, 310 N.E.2d 330 (1974) (plaintiff may not be required to accept a job on terms that entail relinquishment of a constitutional right).

13. See also D. Dobbs, *Handbook on the Law of Remedies* 580 (1973) (punctuation modified):

> Personal preferences of the plaintiff, personal finances of the plaintiff and even irrational fears of the plaintiff are given due weight in deciding what he is expected to do to minimize damages. The standard, then, is not so much the objective standard of the hypothetical reasonable man as it is the subjective standard based on what can be reasonably expected of the particular plaintiff. . . . [The] principle that there are subjective, highly personal decisions that are none of the defendant's business, no matter what a reasonable man would do, seems to lie behind [many of the decisions].

Accord, C. McCormick, *Handbook on the Law of Damages* § 35, at 134 (1935).

There is no reason to single out religious reasons as illegitimate under the avoidable consequences doctrine. The function of the doctrine is to ensure that the tort victim does not fail to undertake mitigation efforts, at the expense of the defendant, that she would have undertaken if she were bearing the full cost of the accident. Here, there can be little doubt that Mrs. Munn made the same decision with respect to blood that she would have made if she had been struck by lightning and no tort was involved. The faithful adherence of Jehovah's Witnesses to the prohibition on taking blood is well known to courts as well as doctors.[14] This is not a case in which the plaintiff might be seeking an economic advantage over the defendant through invocation of a religious principle. Cf. *United States* v. *Lee*, 455 U.S. 252, 263-64 n.3 (1982) (Stevens, J., concurring).

Where, as here, a state recognizes a wide range of personal reasons for refusing to mitigate damages, it cannot arbitrarily refuse to give similar consideration to religious reasons. For a state to regard "'religious claims less favorably than other claims'" is to subject "religious observers [to] unequal treatment." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring), quoting *Bowen* v. *Roy*, 476 U.S. 693, 722 n.17 (1986) (Stevens, J., concurring in part). See also *Employment Division* v. *Smith*, 110 S. Ct. 1595, 1599 (1990).

14. See *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985) ("No matter how ill-advised it may appear to others, this anti-blood injunction is accepted by Jehovah's Witnesses everywhere. . . . [T]he point has arisen not infrequently" in the courts.). So common is the situation that the medical profession has developed standard practices for dealing with the treatment of Jehovah's Witnesses who might, in the doctor's view, need blood. See O'Malley, *Emergency Surgical Procedures in Adult Jehovah's Witnesses*, 9 J. of Abdom. Surg. 160 (June 1967). See also American Medical Association, Office of General Counsel, *Medicolegal Forms With Legal Analysis* 85 (1976) (standard release form for refusal of blood).

B. The holding below requires an innocent party to forgo exercise of a constitutional right without compelling justification

No one disputes that Mrs. Munn had a constitutional right, under the Free Exercise Clause, to decline blood transfusions, which are contrary to firm tenets of her religion. See *In re Brown*, 478 So. 2d 1033 (Miss. 1985); see also *Norwood Hospital* v. *Munoz*, 409 Mass. 116, 564 N.E.2d 1017 (1991); *Fosmire* v. *Nicoleau*, 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990). This is a valuable right—indeed, Mrs. Munn valued it more highly than her life. By its ruling, the court below subordinated this right to the interest of respondent in paying a smaller judgment. Indeed, the court of appeals implicitly valued Mrs. Munn's right at zero, by holding that it could not even be weighed in the balance. Mrs. Munn was thus asked to suffer a huge, uncompensated loss at the hands of an admitted tortfeasor. The Constitution does not permit the state to require an innocent party to forgo a constitutional right for the benefit of the very person whose wrongful act caused the problem. It does not permit a state to create a common law duty—such as the duty to mitigate damages[15]—in conflict with constitutional rights.

The court of appeals observed that this application of the avoidable consequences doctrine is necessary "to encourage plaintiffs to reduce the societal costs of their injuries and to ensure fair treatment of defendants." *Id.* at A17 n.16. But if it is true (and no one disputes it) that Mrs. Munn would have remained faithful to her religious conviction regarding blood no matter what the material consequences would be, then there is no question of reducing the

15. Mississippi tort law conceptualizes the avoidable consequences doctrine as a "duty" on the part of the tort victim to mitigate damages. See *Wall* v. *Swilley*, 562 So. 2d 1252, 1258 (Miss. 1990); *Levy* v. *J.A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296, 298 (1959); *Meridian Star* v. *Kay*, 207 Miss. 78, 91, 41 So. 2d 746, 746 (1949).

social cost of the accident; the only question is whether the cost should be borne by the tortfeasor or by her innocent victim. And it is difficult to see what is "unfair" in the widely-accepted principle of American tort law that the wrongdoer "takes his victim as he finds him." *United States* v. *Feola*, 420 U.S. 671, 685 (1975). When Trudy Algee sought to pass a truck on a two-lane highway in dense fog, she assumed the risk that she would collide with a person with special vulnerabilities. What *is* unfair is to treat religious conditions and obligations as inferior in status to physical conditions or other important personal concerns, as if religion were a mere whim, which any reasonable person would put aside in the interest of reducing the pecuniary damages.

To make matters worse, the court below held that, having "unreasonably" refused the blood transfusion, petitioner lost not only her claim for wrongful death (which might have been averted by the transfusion) but also her claim for the long-term injuries she would have sustained *even if she had taken the transfusion*. These alternative damages would likely have been substantial. Mrs. Munn's injuries were severe, and even if she had accepted a blood transfusion and survived, she would have suffered many months of painful recuperation and might never have recovered completely. Because of Mrs. Munn's refusal of blood, however, respondent paid nothing for these injuries (beyond medical expenses and a small sum for eight hours of pain and suffering). This is a clear penalty on the exercise of Mrs. Munn's constitutional right, in violation of basic principles of constitutional law. See *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729, 2736 (1990); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958); *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926).

The court of appeals admitted this result was "superficially harsh" (Pet. App. A14 n.13) and "arguabl[y] unfair[ ]" (*id.* at A18 n. 16). But the court was willing to countenance this result because it was caused by "Mrs. Munn's own behavior, which was deemed unreasonable by the jury." *Id.* The court seems to have forgotten

that Mrs. Munn's decision was protected by the Constitution. The state is not entitled to impose harsh penalties on a citizen for the exercise of constitutional rights, even if the jury does consider her protected conduct unreasonable.[16]

Moreover, one element of Mrs. Munn's injuries if she had accepted the blood transfusion would have been the psychic injury from being forced to violate a tenet of her religion. This is a cognizable legal right that cannot be ignored. See *Holmes* v. *Silver Cross Hospital*, 340 F. Supp. 125 (N.D. Ill. 1972) (estate of Jehovah's Witness permitted to sue hospital for administering blood transfusions over his objection); *Malette* v. *Shulman*, 72 O.R.2d 417 (Ontario Ct. App. 1990) (upholding common law tort judgment in favor of Jehovah's Witness for unauthorized transfusion). While

16. The court's explanation for this portion of its holding was that the alternative damages sought by petitioner were "hypothetical" (Pet. App. A14). The court quoted a decision of the Mississippi Supreme Court to the effect that "where it is established that future consequences from an injury to a person will ensue, recovery therefor may be had, but such future consequences must be established in terms of reasonable probabilities." *Id.*, quoting *Entex, Inc.* v. *Rasberry*, 355 So. 2d 1102, 1104 (Miss. 1978). Applying that principle to this case, the Fifth Circuit stated that "[i]t is not 'reasonably probable' that the described injuries to Mrs. Munn will occur; in fact, because she did not survive the accident, it is certain that they will *not* occur." Pet. App. A14 (emphasis in original). This explanation will not bear scrutiny. Measuring the damages that would have occurred if she had accepted a transfusion is no more "hypothetical" than measuring the damages from wrongful death. To calculate damages for wrongful death, the jury was instructed to project future earnings based on anticipated life expectancy (which did not occur), as well as to consider the value of her relations to her family and the loss to society of her future contributions (which did not occur). Tr. 652; see *Walters* v. *Gilbert*, 248 Miss. 77, 158 So. 2d 43 (1963). These damages are no less "hypothetical" than her losses if she had accepted a blood transfusion. All damages for loss of life or opportunity are based on events that "did not occur." The difficulty of calculation cannot be a sufficient basis for denying all damages on account of the exercise of a constitutional right.

nonpecuniary damages from the violation of constitutional rights are difficult to measure, they are surely greater than zero.[17] One commentator has noted that "the psychological injury suffered by an individual who believes he has violated a divine command . . . is as real and legitimate as the 'pain and suffering' damages that are regularly reflected in tort recoveries." Yale Note, *supra*, at 1481. See *Trudeau* v. *Wyrick*, 713 F.2d 1360, 1368 (8th Cir. 1983).

Indeed, in considering appropriate damages for forcing a tort victim to violate the precepts of her religion, the courts should reflect upon the fact that Mrs. Munn valued her beliefs more than her life. In a very real sense, Mrs. Munn *mitigated* her damages by taking the course of action least damaging to her interests. If one were to estimate the value of the constitutional right Mrs. Munn was asked to forgo by reference to the value Mrs. Munn placed upon it, it might well be that the alternative damages would have exceeded the damages to which she was entitled for wrongful death. It is unconstitutional for state law to strip a citizen of her federal constitutional rights in this way, without compensation.

C. The decision below is contrary to precedents of this Court

We have demonstrated that the decision below discriminated against religion by denying Mrs. Munn's religious convictions the same consideration given to other personal grounds for refusing treatment, and deprived her of a constitutional right without compensation or adequate justification. The decision is therefore inconsistent with a long line of this Court's precedents, beginning with

17. In actions under 42 U.S.C. § 1983, compensatory damages for constitutional violations regularly include "such injuries as . . . 'personal humiliation[ ] and mental anguish and suffering.'" *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also *Carey* v. *Piphus*, 435 U.S. 247, 263-264 (1978) (mental or emotional "[d]istress is a personal injury familiar to the law" and is recoverable under § 1983).

Sherbert v. *Verner*, 374 U.S. 398 (1963), and including, most recently, *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990). In effect, the Fifth Circuit misread *Smith* and overruled *Sherbert*, and in the process reduced the protections afforded free exercise rights to virtually nothing. This erroneous reading of this Court's precedents must be corrected.

The question posed by this case is analytically indistinguishable from that in *Sherbert*. Indeed, *Sherbert* itself was an "avoidable consequences" case. Mrs. Sherbert, after being dismissed from her job, was unable to take other work because of her Sabbatarian beliefs, and was therefore ineligible for benefits under a statutory provision disqualifying a person who "failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer." 374 U.S. at 401. The requirement of accepting "suitable work" in the absence of "good cause" is the equivalent of the requirement of taking "reasonable" steps to mitigate damages. The Court held that Mrs. Sherbert was constitutionally entitled to unemployment compensation, notwithstanding her religiously-motivated refusal of "available" work. To deny otherwise available benefits because of Mrs. Sherbert's adherence to her religious convictions, the Court said, was equivalent to imposing a "fine" for the exercise of religion. *Id.* at 404. The same is true, in this case, of denying tort compensation on account of Mrs. Munn's refusal to accept a transfusion.

In the years since *Sherbert*, this holding has been reaffirmed in similar cases on three separate occasions, most recently in a unanimous decision, *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989). See also *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Although one common interpretation of the *Sherbert* line of cases was rejected in *Employment Division* v.

Smith, 110 S. Ct. at 1603,[18] *Smith* reaffirmed *Sherbert* with reference to the argument we make in this case. The Court expressly preserved *Sherbert*'s application to contexts that lend themselves "to individualized governmental assessment of the reasons for the relevant conduct." *Id.*; see also *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (plurality opinion). Where such individualized exemptions are given, a court's "refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent" against religion. *Roy*, 476 U.S. at 708. See also *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring). *Smith* thus reaffirmed "that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 110 S. Ct. at 1603, citing *Roy*, 476 U.S. at 708.

To refuse to consider a victim's religious principles or other constitutionally protected grounds for refusing to mitigate damages constitutes precisely the discrimination condemned in *Roy* and *Smith*. Just as the unemployment statutes' requirement of "good cause" for quitting or refusing work "invite[d] consideration of the particular circumstances behind an applicant's unemployment" (*Smith*, 110 S. Ct. at 1603), so the requirement that the injured plaintiff "take reasonable efforts to avoid" further injuries (Pet. App. A9 n.9) invites consideration of the particular circumstances surrounding plaintiff's conduct. See 2 M. Minzer, *supra*, § 16.23, at 16-41 (reasonableness depends on "given set of circumstances"). Likewise, in the unemployment cases, "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Roy*, 476 U.S. at 708 (plurality opinion). In the same way, a determination that a reli-

18. *Sherbert* was commonly interpreted to require the government to make exceptions to generally applicable laws where the laws would impose a burden on the practice of religion without compelling governmental justification. In most instances, such an interpretation is foreclosed by *Smith*.

giously motivated refusal of treatment is "unreasonable" exhibits hostility.

The court below relied on this Court's decision in *Smith* as supporting its holding,[19] on the ground that petitioner's "argument is foreclosed by Supreme Court cases holding that generally applicable rules imposing incidental burdens on particular religions do not violate the free exercise clause." Pet. App. A11. But this seriously misconstrues *Smith*'s reference to "generally applicable laws." By this, the Court meant across-the-board requirements that apply to everyone (like the criminal prohibition of peyote). Nothing in *Smith* supports the proposition that religion may be excluded from an open-ended category of personal considerations that are deemed legitimate under the law. The court's interpretation of *Smith* presumes that the decision overruled *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*. This case presents an opportunity for this Court to reaffirm that the Free Exercise Clause continues to protect against state hostility to, and discrimination against, religion, and to prohibit states from imposing penalties on the exercise of religion.

D. Review by this Court is needed to resolve conflicts and confusion among the lower courts

A commentator notes that the question of religiously-motivated refusals to mitigate tort injuries "has arisen in numerous cases over the years" but has "never [been] satisfactorily resolved" by the courts. Yale Note, *supra*, at 1466. The district court's approach

19. The court also relied on *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), but those decisions are not applicable here. *McGowan* and *Braunfeld* involved challenges to Sunday closing laws. If the laws in question had allowed some enterprises to remain open for "good cause" or for "reasonable" cause, but had refused to recognize religious considerations as falling within those categories, then they would resemble this case. By the same token, if the common law required tort victims to undertake all possible mitigation efforts, then this case would be like *McGowan* and *Braunfeld*.

—to leave the determination of "reasonableness" to the jury—has been adopted in some jurisdictions. *E.g.*, *Lange* v. *Hoyt*, 114 Conn. 590, 159 A. 575 (1932); *Christiansen* v. *Hollings*, 44 Cal. App. 2d 332, 112 P.2d 723, 730 (1st Dist. 1941).[20] The court of appeals' approach—to treat religiously motivated refusals as unreasonable as a matter of law—also has its adherents. *E.g.*, *Corlett* v. *Caserta*, 204 Ill. App. 3d 403, 562 N.E.2d 257 (1st Dist. 1990); *Walter Nashert & Sons* v. *McCann*, 460 P.2d 941, 943 (Okla. 1969); *Industrial Comm'n* v. *Vigil*, 150 Colo. 356, 373 P.2d 308 (1962).

By contrast, some courts have held—as we contend—that a victim's sincere objections to medical treatment cannot be overridden for the benefit of the tortfeasor. In *Montgomery* v. *Terminal R.R. Ass'n*, 73 Ill. App. 3d 650, 392 N.E.2d 77 (5th Dist. 1979), an injured railway worker "refused surgical treatment on religious grounds" (*id.* at 653, 392 N.E.2d at 80), and the defendant sought to rely on this failure to mitigate in its defense before the jury. The trial court excluded the evidence, and the appellate court affirmed, holding that a tort victim "has no duty to undergo surgery to mitigate his damages." The court stated that "'[w]hether the

20. As the district court recognized (Pet. App. A63), this case is distinguishable from *Shorter* v. *Drury*, 103 Wash. 2d 645, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985). In *Shorter*, a Jehovah's Witness entered the hospital for a surgical procedure, informing the doctor that her religious beliefs would not permit her to accept a blood transfusion. Complications resulting from the negligence of the doctor led to a serious loss of blood, which, in the absence of transfusions, resulted in death. In a decision upheld by the Washington Supreme Court, the jury held the doctor liable for only 25% of the damages. In that case, the patient specified the terms under which medical services would be provided, and thus voluntarily assumed the risk of any loss resulting therefrom—without which assumption of risk the doctor would not have performed the operation on those terms. Here, the claimant was an innocent victim of a tort. Mrs. Munn did not consent to the accident, and did not release respondent from any liability that might result from it.

plaintiff is to undergo a serious operation is a matter for him to decide.'" *Id.* at 655, 392 N.E.2d at 81 (citation omitted). Accord, *Harris* v. *Equitable Life Assurance Society*, 572 P.2d 593, 595 (Okla. App. 1977); *Cero* v. *Oynesando*, 48 R.I. 316, 138 A. 45, 46 (1927) (whether a tort victim must undergo major surgery "is so peculiarly personal that the law does not allow a jury or court to decide this for the individual").[21]

The decision below also conflicts with *Montgomery* v. *Board of Retirement*, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (5th Dist. 1973). In that case, the court ruled that the state could not constitutionally deny disability benefits to a worker who refused, on religious grounds, to undergo surgery to remove the tumor that had disabled her. There is no relevant distinction between the contexts of tort damages and disability benefits for these purposes. In both contexts, the question is whether the recovery to which an injured party would otherwise be entitled may be reduced on account of her religiously-motivated refusal of medical services.[22]

Moreover, courts have frequently held, in cases involving rights other than the free exercise of religion, that "injured parties need not surrender legal rights in an effort to minimize damages." Indeed, a leading treatise calls this the "general rule." 2 M. Minzer, *et al.*, *Damages in Tort Actions*, *supra*, at 16-34 (collecting cases). See *Restatement (Second) of Torts* § 918 comment j (1979) ("[a] person is not ordinarily required to surrender a right of

21. The opinions in these cases did not expressly hold that the results were compelled by the First Amendment or other principles of constitutional law. It is to be expected that decisions in favor of the plaintiff on this issue would rest, in the first instance, on common law principles. Only when the courts reject the plaintiff's position will a constitutional question need to be addressed.

22. See *Harris* v. *Equitable Life Assurance Society*, 572 P.2d 593, 595 (Okla. App. 1977) (equating avoidable consequences law in negligent personal injury cases to workers' compensation cases).

substantial value in order to minimize loss"). In particular, "[c]ourts are generally reluctant to limit damages, as a matter of law, when the injured party bears some personal conviction against the type of treatment proposed as reasonable by the defendant." 2 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 8.3, at 452 (1985).

Accordingly, a number of decisions hold, in conflict with the decision below, that personal convictions and other constitutionally protected interests must be accepted as "reasonable" *as a matter of law*. For example, several courts have rejected the argument in "wrongful birth" actions that the parents should have mitigated damages by aborting the unwanted child or placing the child for adoption. See *Smith* v. *Gore*, 728 S.W.2d 738, 751-52 (Tenn. 1987) (to require an abortion or adoption would "impermissibly infringe upon Constitutional rights to privacy in these matters"); *Marciniak* v. *Lundborg*, 153 Wis. 2d 59, 450 N.W.2d 243, 247 (1990) (the decision must be left with the individual because it involves "highly personal matters and . . . deeply held moral or religious convictions"); *Rivera* v. *State*, 94 Misc. 2d 157, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) ("The decision to have an abortion or not is for the individual to make, based on whatever religious, philosophical or moral principles the individual may adhere to").

That these cases involve rights other than the free exercise of religion (for example, reproductive freedom) does not lessen the conflict. Either the decision below is a form of discrimination against religion or it is in conflict with the "general rule" that the avoidable consequences doctrine does not impose a duty to forgo constitutional rights. This conflict should be resolved.

III. The Admission Of Irrelevant And Prejudicial Evidence Concerning The Controversial Beliefs Of Jehovah's Witnesses Should Not Have Been Deemed "Harmless"

Defense counsel was permitted to conduct a searching examination in front of the jury into the beliefs of Jehovah's Witnesses on subjects far removed from their objections to receiving blood. During cross-examination of petitioner, an unemployed black man with an eighth-grade education (Tr. 108-110), counsel elicited these facts, among others[23]: (1) Jehovah's Witnesses believe Jesus Christ returned to Earth in 1914 and has since invisibly ruled through their auspices; (2) Witnesses believe that all non-Witnesses will be eternally damned; (3) Witnesses will not serve their country in time of war or salute its flag;[24] and (4) the Munns, contrary to Witnesses' teaching, had lived together before marrying.[25]

Judge Smith, writing for the court, conceded the "utter irrelevance" of this information to any issue properly before the jury, as well as the "potential for prejudice that [it] carried." Pet. App. A6-A7 n.6; see also *id.* at A20 (the testimony was "potentially prejudicial"). Nevertheless, he concluded that—though the issue was "close"—the error in admitting the testimony "did not adversely influence the jury." *Id.* at A7.[26] This conclusion rested on two determinations: first, the damages awarded were "not so small as to arouse suspicion as to the jury's motives"; and second, the jury's

23. The relevant portion of the cross-examination is reprinted in Judge Rubin's dissenting opinion. Pet. App. A26-A29.

24. As the dissenting judge pointed out (Pet. App. A26), the trial took place during a period of publicity concerning this Court's decision in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and legislation prohibiting desecration of the flag.

25. Neither was a member of the religion at the time. Tr. 140.

26. Only one member of the three-judge panel joined this portion of the opinion. Judge Barksdale concurred on the ground that the evidence was relevant and admissible, and Judge Rubin dissented.

refusal to award wrongful death damages "most likely" was based on its belief "that Mrs. Munn would have lived had she taken blood transfusions." *Id.* at A8.

Even assuming that the error was non-constitutional in nature and thus subject to a lower standard of review for harmlessness, the court of appeals fundamentally misconstrued the harmless error standard and consequently affirmed an unjust verdict "permeate[d]," in Judge Rubin's words, with the "odor" of religious prejudice. Pet. App. A39. This Court has held that the harmless error inquiry "cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *United States* v. *Lane*, 474 U.S. 438, 449 (1986); *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). Yet this is all the majority's analysis consists of. The appropriate question, according to this Court, is whether, even if there is enough evidence to support the verdict, "the error itself had substantial influence." *Lane*, 474 U.S. at 449; *Kotteakos*, 328 U.S. at 765. Indeed, even if "one is left in grave doubt" about this, the judgment should be reversed. *Id.*

In this case, the entire proceeding hinged on whether the jury would view Elaine Munn and her husband as sympathetic victims or as fanatical and unreasonable persons whose tragedy was essentially self-inflicted. Every issue facing the jury was colored by that central dichotomy. Was Mrs. Munn's refusal of blood unreasonable? Was this the cause of death? How much did she suffer? How much did petitioner suffer? How much should respondent pay to recompense the Munns for their loss? Judge Rubin, in dissent, commented that "any lawyer who has tried personal injury cases" knows that "the sympathy or disaffection the jury has for the victim affects the amount of damages." Pet. App. A35. The substantiality of the error is all the more obvious in this case, since the jury was asked to judge the reasonableness of Mrs. Munn's actions. As the court of appeals itself recognized, "the jury undoubtedly assesse[s] the plaintiff's religion in reaching its conclusion," and "if the particular faith strikes the jury as strange or bizarre, the jury

will probably conclude that the plaintiff's failure to mitigate was unreasonable." *Id.* at A12-A13. In this light, it is virtually impossible to see how the jury's ultimate conclusion could *not* have been influenced by the blatant attempt to portray petitioner's religion as strange, bizarre, inconsistent, fanatical, unpatriotic, and hypocritical.

The verdict speaks for itself. The jury found adherence to Witness teachings "unreasonable." It resolved conflicting medical evidence about Mrs. Munn's fate if she had accepted a transfusion as 100% in defendant's favor. It awarded not a penny more for Mrs. Munn's pain and suffering than defense counsel suggested. It awarded petitioner no damages for pain and suffering at all, despite his undoubted injuries. As Judge Rubin noted, "no reason but general dislike of the plaintiff" can explain so meager an award for an accident resulting from the admitted negligence of a defendant, with such dire consequences. Pet. App. A37.

Furthermore, the court of appeals acknowledged in a footnote that the error in this case was constitutional in nature, but it failed to apply the higher standard for harmlessness specified by this Court. See *Kotteakos*, 328 U.S. at 764-65; *Chapman* v. *California*, 386 U.S. 18 (1967). The court of appeals observed that respondent's purpose in introducing otherwise irrelevant evidence about Jehovah's Witness beliefs may have been "to imply that, in her view, because the entire religion is unreasonable, any decision made in accordance therewith is *per se* unreasonable." Pet. App. A6 n.5. The court noted that for the jury to rely on any such argument would violate *United States* v. *Ballard*, 322 U.S. 78 (1944), "which bars adjudication of a religion's reasonableness." *Id.* It should have followed that, since the evidence invited constitutional error, it could not be disregarded unless it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. But the court below applied an exceedingly relaxed version of the *Kotteakos* test. Having found the question under that standard "close," it is inconceivable that the court could have found this error, which was

a deliberate violation of petitioner's First Amendment rights, harmless under a proper standard.

That a jury was called on to judge the "reasonableness" of the Munns' adherence to Jehovah's Witness beliefs was fundamentally wrong. That the jurors were sent to this task with a summary of the Witnesses' unpopular religious opinions ringing in their ears was unconscionable, and should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 29, 1991

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ray James MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased, *Plaintiffs-Appellants*,

v.

Trudy E. ALGEE, *Defendant-Appellee*.

No. 90-1173
Feb. 28, 1991.
[924 F.2d 568]

Phil Zerilla, Jr., Martin & Zerilla, Memphis, Tenn., for plaintiffs-appellants.

Gary K. Smith, Robert H. Harper, Shuttleworth, Smith & Webb, Memphis, Tenn., for defendant-appellee.

Before RUBIN, SMITH, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Plaintiff Ray James Munn asserts that his and his deceased wife's adherence to the Jehovah's Witnesses faith was used improperly to impair his ability to recover compensation for their injuries. Finding no reversible error, we affirm.

I. Facts.

On Christmas morning 1986, vehicles driven by Munn and defendant Trudy Algee collided in Tunica County, Mississippi. Elaine Munn, Munn's wife and a passenger in his car, was transported to the Regional Medical Center in Memphis, Tennessee, arriving approximately three hours after the accident. Doctors identified a variety of injuries, including multiple rib and pelvic fractures, a lacerated chest artery, and a retroperitoneal hematoma.

Upon arrival at the hospital, Mrs. Munn informed doctors that she was a Jehovah's Witness and thus would not accept blood transfusions. Responding to her deteriorating condition, doctors unsuccessfully sought Munn's permission later in the day to perform a blood transfusion on his wife. Munn also refused to allow doctors to **[571]** transfuse Mrs. Munn's own blood back into her.

Mrs. Munn died on the operating table from a loss of blood. Elaine and Ray James Munn incurred medical expenses in the amounts of $10,411.67 and $241.44, respectively.

II. Procedural History.

Munn brought suit against Algee in three separate capacities: (1) individually for his own injuries; (2) as administrator of his deceased spouse's estate; and (3) on behalf of his children, who, along with Mr. Munn, are the wrongful death beneficiaries under the Mississippi wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 1990). The district court granted Algee's motion for partial summary judgment, thereby precluding Munn from establishing what his wife's damages would have been had she consented to the blood

transfusions and survived. The court granted a directed verdict in favor of plaintiffs on the question of liability.

After a trial, the jury awarded Munn $241.44 for his own medical expenses. It also returned a verdict for Munn in the amount of $20,411.67 to compensate Mrs. Munn's estate for her medical bills ($10,411.67) and her pain and suffering ($10,000.00). With respect to the wrongful death claim, the jury concluded that Mrs. Munn would not have died had she accepted blood transfusions and thus awarded the wrongful death beneficiaries no damages.

Munn moved for a new trial, asserting that the court erred in (1) admitting evidence of Jehovah's Witnesses' beliefs; (2) allowing Algee to invoke the avoidable consequences doctrine; (3) refusing to allow Munn to show what his wife's damages would have been had she accepted blood and lived; (4) refusing to apply the eggshell skull doctrine; (5) entering judgment on allegedly inconsistent answers to jury interrogatories; and (6) its instructions to the jury. Munn also argued that the verdict was against the great weight of the evidence and that the damage award was inadequate. The court denied the motion for new trial, 730 F. Supp. 21, and Munn now appeals.[1]

III. Admission of Evidence of Religious Beliefs.

Over Munn's objection, the district court allowed Algee's counsel to question him about many aspects of the Jehovah's

1. Munn also argues that Algee improperly used her peremptory challenges to exclude blacks from the jury. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). That assertion is foreclosed by our recent holding that *Batson* does not apply to suits between private parties. See *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir.) (en banc), cert. granted, ___ U.S. ____, 111 S. Ct. 41, 112 L. Ed. 2d 18 (1990).

Witnesses faith, including, *inter alia*, the following beliefs and practices: (1) Christ's physical return to earth in 1914; (2) the eternal damnation of all those not adhering to the faith; (3) the non-existence of hell; (4) the non-existence of souls; (5) refusal to "do service to their country"; and (6) refusal to salute the flag. Algee's counsel further questioned Munn about his and his wife's adherence *vel non* to the faith's prohibition on premarital cohabitation.

The admission of this evidence raises two questions: (1) whether the district court abused its discretion in admitting Munn's testimony, *see Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983); and (2) assuming the court abused its discretion, whether this error affected any substantial right of Munn's, *see* Fed. R. Evid. 103(a); *LeBoeuf v. K-Mart Corp.*, 888 F.2d 330, 333 (5th Cir.1989).[2] **[572]**

A. *Admissibility.*

Evidence is relevant (and thus potentially admissible) if it tends "to make the existence of any fact that is of consequence to the

2. Although Munn preserved error by objecting to the admission of this evidence, he does not directly appeal the evidentiary ruling. Munn cited this ruling as error in his new trial motion and instead appeals the unfavorable disposition of that motion. However, this does not affect the nature of our review. If Munn had simply appealed the adverse evidentiary ruling, we would have asked (1) whether the district court abused its discretion in admitting the evidence and (2) if so, whether such abuse affected a substantial right. Because the district court responded to Munn's new trial motion by reiterating its belief in the correctness of its initial ruling, we apply the same two-step analysis even though the error was raised through the conduit of a new trial motion. *See generally* 1 S. Childress & M. Davis, *Standards of Review* § 5.8 at 327 & n. 35 (1986).

determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. For Munn's testimony to be relevant, it is essential to identify a "fact of consequence" whose existence is made more or less probable thereby. Because we are unable to discern a fact of consequence of which this testimony is probative, we hold that the court erred in allowing the questions and that the error constitutes an abuse of discretion.

Algee asserts that the fact of consequence of which this testimony is probative is the sincerity of the Munns' adherence to their faith.[3] One might plausibly argue that sincerity is a fact of consequence in that a decision sincerely motivated by a religious belief is more reasonable[4] than an otherwise inexplicable action. However, only the discussion of the Munns' adherence to the prohibition on premarital cohabitation reflects upon their sincerity. Simply inquiring otherwise into whether the Jehovah's Witnesses faith incorporates certain beliefs does not reveal anything about whether the Munns sincerely adhered to them.

3. Algee's brief asserts that this questioning responded to Munn's testimony on direct examination concerning "how zealously he and the decedent followed these teachings." In explaining its decision to admit the testimony, the court observed that "the plaintiff in his direct examination professed his very strong feelings about his faith."

4. The reasonableness of Mrs. Munn's decision is most definitely a fact of consequence, for Algee invoked the doctrine of avoidable consequences, which precludes recovery for injuries that an injured plaintiff might *reasonably* have avoided. *See infra* part IV.

Nor were these questions directly probative of the reasonableness of Mrs. Munn's decision to refuse blood. Algee fails to demonstrate how Jehovah's Witnesses' beliefs unrelated to blood transfusions reveal the reasonableness of her adherence to one particular article of the faith.[5]

Algee further asserts that, in any event, she was entitled to counter Munn's direct testimony about his wife's religious beliefs. However, Fed. R. Evid. 611(b) limits the scope of cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness."

The bulk of Munn's testimony on cross-examination did not concern the sincerity of his and his wife's beliefs. As noted above, simply listing Jehovah's Witnesses' beliefs says nothing about the sincerity of the Munns' adherence thereto. Accordingly, this testimony was not within "the subject matter of the direct examination." Moreover, Munn's direct testimony did not cover any beliefs other than the prohibition on blood transfusions. Accordingly, because Munn's testimony did not tend to prove or disprove any (permissible) material fact and thus was irrelevant, its admission was error amounting to an abuse of discretion.[6]

5. Algee may have sought to imply that, in her view, because the entire religion is unreasonable, any decision made in accordance therewith is *per se* unreasonable. However, *United States v. Ballard*, 322 U.S. 78, 87, 64 S. Ct. 882, 886, 88 L. Ed. 1148 (1944), which bars adjudication of a religion's reasonableness, forbids a jury from relying upon this argument.

6. We further conclude that the district court abused its discretion in deciding that the probative value of this evidence outweighed its potential for prejudice. Fed. R. Evid. 403. Although we appreciate the potential for prejudice that this

B. *Reversible or Harmless Error.*

However, simply because the court abused its discretion in admitting his testimony does not entitle Munn to relief. Rule 103(a) indicates that courts of appeals should not reverse on the basis of erroneous evidentiary rulings unless a party's "substantial right" is affected.

This question is not susceptible to mechanical analysis. "Rule 103 is silent as to **[573]** what factors a court must consider in determining whether substantial rights have been affected, indicating that the court must proceed on a case to case basis rather than apply a mechanical rule." 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[01] at 103-6 (1990). However, we have stated repeatedly that "'[a]n error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict.'" *Pregeant v. Pan Am. World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir. 1985) (quoting *United States v. Underwood*, 588 F.2d 1073, 1076 (5th Cir. 1979)).

After reviewing the record, we conclude—although it is a close question—that the admission of Munn's testimony did not adversely influence the jury. Munn failed to articulate any substantial right

evidence carried, our conclusion in this regard follows primarily from its utter irrelevance.

affected by this evidence's admission,[7] and no prejudice is reflected in the jury's verdict.

First, Munn cannot plausibly argue that the amount of damages for pain and suffering awarded to Elaine Munn's estate demonstrates prejudice. For approximately eight hours of pain and suffering, the jury awarded $10,000.00, an amount not so small as to arouse suspicion as to the jury's motives.

Second, the jury's failure to award Munn any damages for his own pain and suffering most likely reflects the relatively minor nature of his injuries. *See Pregeant*, 762 F.2d at 1249 (fact that verdict was otherwise supported demonstrates harmless nature of erroneous admission of evidence). He incurred only $241.44 in medical expenses and by his own admission suffered only "bruises and contusions."

The jury's failure to award any wrongful death damages is the most plausible expression of any prejudice caused by the erroneous admission of this evidence. However, the jury most likely refused to compensate the wrongful death beneficiaries because it believed that Mrs. Munn would have lived had she taken blood transfusions. A number of doctors testified as to whether blood transfusions would

7. In *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1258-59 (5th Cir.), *cert. denied*, 488 U.S. 890, 109 S. Ct. 224, 102 L. Ed. 2d 214 (1988), we held that the erroneous failure to admit certain evidence was not reversible partly because the proponent had not shown how the error caused prejudice.

have saved Mrs. Munn's life,[8] and although their testimony was conflicting, the evidence was such that in deciding the cause of Mrs. Munn's death, there is no indication that the jury was using her refusal to take blood as a pretext for expressing its possible distaste for Jehovah's Witnesses. *See id.*

Thus we hold that the erroneous admission of Munn's testimony did not affect any substantial right. In this regard we affirm the denial of the motion for new trial.

IV. The First Amendment and the Avoidable Consequences Doctrine.

In an effort to avoid liability for Mrs. Munn's death, Algee argued that Mrs. Munn's refusal to accept blood transfusions was unreasonable and thus that the doctrine of avoidable consequences[9]

8. Dr. W. Alan Walker testified that Mrs. Munn would have survived had she accepted the blood transfusions. Dr. Timothy Fabian testified that there was a 90-95% chance that she would have lived had she taken blood. On the other hand, Dr. Earnest Payne, Jr., testified that she would have died even had she taken the blood. Dr. Joseph Sapala stated that there was a 75% possibility that Mrs. Munn would have died even if she had accepted the blood.

9. Under Mississippi law, an injured plaintiff may not recover for damages that he did not take reasonable efforts to avoid. *Buras v. Shell Oil Co.*, 666 F. Supp. 919, 924 (S.D. Miss. 1987) (applying Mississippi law); *Pelican Trucking Co. v. Rossetti*, 251 Miss. 37, 167 So. 2d 924, 927 (1964), *overruled in part, sustained in part*, 251 Miss. 37, 170 So. 2d 573 (1965); *National Dairy Prods. Corp. v. Jumper*, 241 Miss. 339, 130 So. 2d 922, 923 (1961); *Levy v. J.A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296, 298 (1959); *Vining v. Smith*, 213 Miss. 850, 58 So. 2d 34, 34 (1952); *Yazoo & M.V.R. v. Fields*, 188 Miss. 725, 195 So. 489, 490 (1940); *Tri-State Transit Co. v. Martin*, 181 Miss. 388, 179 So. 349, 350 (1938); *North Am. Accident Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528,

precluded **[574]** any recovery. Munn now asserts that application of this doctrine violated the first amendment's free exercise and establishment clauses, arguing that the rule burdened his wife's exercise of the Jehovah's Witnesses faith and invited the jury to consider the reasonableness of that religion.

Munn cites a published article to support his argument that application of this doctrine violates the first amendment. *See* Comment, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 Yale L.J. 1466 (1978). The comment writer accurately identifies two judicial approaches to religiously motivated refusals to mitigate tort damages. *Id.* at 1467. The first, labelled the "objective" approach, holds that religion may not justify an otherwise unreasonable failure to mitigate. The second, termed the "case-by-case" approach, attempts to accommodate religious beliefs by allowing the jury to consider the plaintiff's religious beliefs in determining whether his or her failure to mitigate was reasonable.

The author concludes that the objective approach violates the free exercise clause, while the case-by-case approach violates the establishment clause. In the instant case, the court applied the case-by-case approach, attempting to accommodate Mrs. Munn's religious beliefs.[10]

530 (1937); *Mars v. Hendon*, 178 Miss. 157, 171 So. 880, 883 (1937); *Scott & Garrett v. Green River Lumber Co.*, 116 Miss. 524, 77 So. 309, 310 (1918). Courts frequently use the phrases "avoidance of consequences" and "mitigation of damages" interchangeably.

10. The court stated that "[t]he jury is going to be called upon to determine the reasonableness of their beliefs considering their religion as one of the factors." Later in the proceedings the court similarly declared that "[o]ne of the issues for

Without identifying the court's approach, Munn argues that its application of the avoidable consequences doctrine violated both first amendment clauses. He accordingly desires, as did the comment author, *see id.* at 1468, 1486-87, that we recognize a special exemption from the doctrine's application for religiously motivated failures to mitigate damages. We decline to do so, as we conclude that proper application of the avoidable consequences doctrine does not violate the first amendment.

A. *Free Exercise Concerns.*

Munn contends that applying the mitigation of damages principle to this case violates the first amendment because it incidentally affects Mrs. Munn's exercise of her religion. This argument is foreclosed by Supreme Court cases holding that generally applicable rules imposing incidental burdens on particular religions do not violate the free exercise clause. *See McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Sunday closing laws do not violate free exercise rights of Saturday sabbatarians); *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed.2d 563 (1961) (same); *see also Employment Div., Dept. of Human Resources v. Smith*, ___ U.S. ___, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990) (free exercise clause does not prohibit application of Oregon drug laws to ceremonial ingestion of peyote). Accordingly, we hold that the application of the mitigation of damages doctrine, under either of the two approaches, does not violate the free exercise clause of the first amendment. *Accord Corlett v. Caserta*, 204 Ill. App. 3d 403, 149 Ill. Dec. 793, 562 N.E.2d 257 (1st Dist.1990) (involving Jehovah's Witness).

the jury to decide is the reasonableness of the deceased, presumably Mr. Munn's decision, based on their belief in the Jehovah's Witness doctrine."

B. *Establishment Clause Issues.*

The more compelling problem with the application of the doctrine in this case is that it potentially invited the jury to judge the reasonableness of the Jehovah's Witnesses' religion. *See Hernandez v. Commissioner*, 490 U.S. 680, 109 S. Ct. 2136, 2146, 104 L. Ed. 2d 766 (1989); *United States v. Ballard*, 322 U.S. 78, 87, 64 S. Ct. 882, 886, 88 L. Ed. 1148 (1944). We conclude that in an appropriate case, application of the case-by-case approach to religiously motivated refusals to mitigate damages can involve weighing the reasonableness of religious beliefs and thus arguably would violate the establishment clause. However, because here the court's application of this approach was designed to *assist* Munn in circumventing the avoidable consequences doctrine, we need not address **[575]** squarely the constitutionality of the case-by-case approach, for in any event Munn is entitled to no relief.

Application of the case-by-case approach allows a jury to consider the religious nature of a plaintiff's refusal to avoid the consequences of a defendant's negligence. Accordingly, otherwise unreasonable conduct may be deemed reasonable. However, the question of whether a jury decides to label such conduct as reasonable may depend upon its view of the religious tenet that motivated the plaintiff's failure to mitigate damages. *See* Comment, *supra*, at 1484.

If the jury finds the religion plausible, it will more likely deem the conduct reasonable; on the other hand, if the particular faith strikes the jury as strange or bizarre, the jury will probably conclude that the plaintiff's failure to mitigate was unreasonable. Because the plaintiff's religion is the only basis upon which otherwise unreasonable conduct can be deemed reasonable, the jury undoubtedly

assesses the plaintiff's religion in reaching its conclusion. A strong case can be made that the first amendment forbids such an assessment.

However, simply because the case-by-case approach might involve impermissible assessment of a religion's reasonableness does not mean that Munn is entitled to a new trial. Munn himself interjected religion into the case, seeking to explain his wife's conduct. Had he been prohibited from doing so, the jury undoubtedly would have deemed her decision unreasonable.[11] In short, the jury's assessment of Elaine Munn's religion did not harm Munn's case. Consequently, we find the court's application of the case-by-case approach to be, at most, harmless error.[12]

V. Proof Of Damages.

In granting Algee's motion for partial summary judgment, the district court precluded Munn from establishing what Mrs. Munn's damages would have been had she accepted the blood transfusions and lived. *Munn v. Southern Health Plan, Inc.*, 719 F. Supp. 525, 531 (N.D. Miss. 1989). Munn unsuccessfully challenged this decision in his motion for a new trial and now appeals that denial.

When reviewing the disposition of a new trial motion, we normally reverse the judgment only for an abuse of discretion. However, when the district court's ruling is predicated on its view of a question of law, it is subject to *de novo* review. *Dixon v.*

11. Munn's brief concedes as much.

12. However, we urge the district courts to apply the "objective" approach to religiously motivated refusals to mitigate damages, for that approach plainly violates neither the free exercise clause nor the establishment clause.

International Harvester Co., 754 F.2d 573, 586 (5th Cir. 1985) (citations omitted). In *Dixon*, we stated that the disposition of a new trial motion "will not be disturbed unless there is an abuse of . . . discretion *or* misapprehension of the law." *Id.* (emphasis added). *See also Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. Unit B 1981); *Cruthirds v. RCI, Inc.*, 624 F.2d 632, 635 (5th Cir. 1980). Because the availability of damages is a question of law, we do not afford the district court's decision any deference.

We nonetheless agree with the court's determination that Munn should not be compensated for these hypothetical damages, as Mrs. Munn did not actually suffer the harm from which the damages are sought. Mississippi law compels this conclusion. In *Entex, Inc. v. Rasberry*, 355 So. 2d 1102 (Miss. 1978), the court stated that "[t]he general rule is that where it is established that future consequences from an injury to a person will ensue, recovery therefor may be had, but such future consequences must be established in terms of reasonable probabilities." *Id.* at 1104 (citing 25 C.J.S. *Damages* § 31 (1966)). It is not "reasonably probable" that the described injuries to Mrs. Munn will occur; in fact, because she did not survive the accident, it is certain that they will *not* occur. We thus affirm the denial of Munn's new trial motion insofar as it related to proof of **[576]** damages.[13]

13. The combined effect of this conclusion and the avoidable consequences doctrine is at least superficially harsh: Mrs. Munn's estate and her husband and children are unable to recover either the damages she would have suffered or wrongful death damages. The district court, perceiving unfairness, crafted a jury instruction that allowed the jury to award wrongful death damages even if it found that Mrs. Munn's refusal to accept blood was unreasonable and that she would have lived had she accepted the blood. We reject this approach. See *infra* note 16.

VI. Additional Issues.

A. *Application of the Eggshell Skull Doctrine.*

Munn argues that the "eggshell skull" doctrine, which requires a defendant to compensate a plaintiff for unforeseeable injury flowing from some pre-existing condition, entitles him to compensation for his wife's wrongful death. Munn attempts to extend the doctrine's application to situations in which the plaintiff's pre-existing condition is "mental" rather than physical.

However, the principle has been applied only to pre-existing *physical* injuries. *See, e.g.*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on Torts* § 43 at 291 (1984) (referring to victim's "concealed *physical* condition") (emphasis added); Restatement (Second) of Torts § 461 (1977) (same). We decline the invitation to extend its scope, absent substantial indication that the state courts of Mississippi would do so. Accordingly, the court did not err in refusing to apply the eggshell skull doctrine to the instant case, and its denial of Munn's new trial motion in this respect is affirmed.[14]

B. *Inconsistent Interrogatory Answers.*

The following interrogatory was submitted to the jury:

14. Even if we were inclined to extend application of the doctrine to pre-existing "mental" conditions (as Munn characterizes his wife's religious beliefs), the situation in this case is distinguishable from one in which the defendant's negligence aggravates some pre-existing psychological defect (e.g., where a car accident makes an already paranoid plaintiff even more so). Algee's negligence did not aggravate some pre-existing mental illness; rather it put Mrs. Munn in a situation in which she felt obliged to follow one of her beliefs.

4. Do you find that the original injuries sustained by Elaine Munn combined with her unreasonable refusal of blood to cause her death?

Answer: _____
Enter "Yes" or "No"

If your answer to this interrogatory is "Yes," what percentage did Elaine Munn's unreasonable refusal of blood contribute to her death? ____ percent (%)

The jury answered "yes" to the first part and "100%" to the second. Munn contends that these answers are inconsistent and consequently that the court erred in denying his motion for a new trial. More specifically, Munn argues that because his wife's original injuries "combined" with her refusal of blood to cause her death (according to the jury's answer to the first part of the question), her refusal to take blood could not possibly constitute 100% of the cause of her death.

When a litigant claims that the jury's answers to interrogatories are inconsistent, the seventh amendment compels the district court to seek a "view of the case which makes the jury's answers consistent." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973).[15] The court properly applied this test, holding that the

15. *See also Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir.) *cert. denied*, 490 U.S. 1051, 109 S. Ct. 1967, 104 L. Ed. 2d 434 (1989); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987); *Perricone v. Kansas City S. Ry.*, 704 F.2d 1376, 1379 (5th Cir. 1983).

jury's answers were consistent with one another and with the applicable instruction.[16] *Munn v. Algee*, 730 F. Supp. at 27-28.

16. The court instructed the jury to "determine the percentage of wrongful death damages attributable to Elaine Munn's refusal to accept the transfusions," allowing it "to place this percentage at 0%, 100%, or any percentage in between." In its opinion denying Munn's motion for a new trial, the court noted that it instructed the jury "that even if it found that Mrs. Munn's death was avoidable and that her refusal of the blood transfusion was unreasonable, it could still award the plaintiff wrongful death damages, if it further found that the defendant's negligence was a contributing cause of Mrs. Munn's death." The interrogatory challenged in this appeal corresponds to this instruction.

We reject this approach. Apportioning wrongful death damages is inconsistent with the mitigation of damages doctrine. If a jury finds that a certain consequence of the defendant's negligence could reasonably have been avoided by the plaintiff, the plaintiff cannot recover for that consequence. The bar on recovery is total; retreating to notions of causation is inappropriate in light of the purposes of the doctrine, which are to encourage plaintiffs to reduce the societal costs of their injuries and to ensure fair treatment of defendants. That the defendant's negligence may have caused the avoidable injury is irrelevant. *See* 2 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, *Damages in Tort Actions* § 16.00 (1989); Restatement (Second) of Torts § 918 comment (a) (1977) (observing that in cases covered by § 918, "it is not true ... that the conduct of the tortfeasor ceases to be a legal cause of the ultimate harm"); Stein, *Damages and Recovery: Personal Injury and Death Actions* § 126 (1972) (noting that rule is grounded in public policy (not causation)). *Contra Corlett v. Caserta* (where "the patient exercises his fundamental and religious right to refuse a reasonable life-saving medical procedure and subsequently dies, the patient's estate should bear a proportionate share of tort liability for the patient's wrongful death to the extent that the patient's death was proximately caused by the patient's refusal of the reasonable life-saving treatment").

The mitigation doctrine is designed to operate in precisely this kind of situation, i.e., where the defendant's negligence concededly *caused* all of the

[577] We agree with the court's conclusion. These answers do not conflict; instead, they reflect the entirely plausible view that although both the injury and the refusal were causal factors in Mrs. Munn's death, she would have survived had she taken the blood.[17] We accordingly affirm the court's denial of Munn's motion for a new trial insofar as that motion rested on this foundation.

C. *Great Weight of the Evidence.*

Munn amorphously asserts that the jury's verdict is against the great weight of the evidence, but he fails to specify which aspect of the verdict he finds objectionable. However, Munn seems most upset with the jury's apparent conclusion that Mrs. Munn would not have died had she accepted the blood transfusion.

plaintiff's injuries, some of which might reasonably have been avoided by the injured plaintiff. There is no need for a doctrine that precludes recovery only where "the defendant's negligence was [not] a contributing cause" of damages that might reasonably have been avoided by the plaintiff; causation principles prevent imposition of liability on the defendant therefor.

Although we understand the district court's desire to prevent the arguable unfairness of the result, we note that Munn's inability to recover neither wrongful death damages nor hypothetical damages flows from Mrs. Munn's own behavior, which was deemed unreasonable by the jury. If she had acted reasonably, she would have survived (according to the jury), and thus wrongful death would not have been an issue in the case. (Had she acted reasonably and *not* survived, her wrongful death beneficiaries *would* have been able to recover, since death would not have been an *avoidable* consequence.) Had she acted reasonably and lived, she would have been able to recover for pain, suffering, medical expenses, and lost wages.

17. *See supra* note 8.

We reverse the disposition of a new trial motion predicated on the movant's view of the weight of the evidence only if the court abused its discretion. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985) (citing *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930-31 (5th Cir. 1982)). Our deference is somewhat greater when the court denies the new trial motion. *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 986 (5th Cir. 1989) (citing *Franks v. Associated Air Center, Inc.*, 663 F.2d 583, 586 (5th Cir. 1981)); *Evers v. Equifax, Inc.*, 650 F.2d 793, 796-97 (5th Cir. Unit B July 1981).

Although various witnesses disagreed about whether Mrs. Munn would have lived had she consented to the blood transfusions, the jury was entitled to believe those witnesses who concluded that she would have survived. The jury was entitled to believe the testimony of Drs. Walker and Fabian, despite conflicting testimony, *see supra* note 8, and to conclude that she would have survived had she assented to the blood transfusions. Accordingly, the jury's conclusion in this regard was not against the great weight of the evidence, and the district court's denial of the motion for new trial is in this regard affirmed.

[578] D. *Adequacy of the Damage Award.*

Munn contends that he deserves a new trial because the jury award was inadequate. We do not alter a damage award unless it is so "'inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.'" *Taylor v. Green*, 868 F.2d 162, 164 (5th Cir.) (quoting *Garrick v. City & County of Denver*, 652 F.2d 969, 972 (10th Cir. 1981) (citation omitted)), *cert. denied*, ___

U.S. ___, 110 S. Ct. 127, 107 L. Ed. 2d 87 (1989). Munn fails to specify which aspect of the jury's award was inadequate.

Although the court did admit potentially prejudicial testimony into evidence, see *supra*, the jury's award is not so inadequate as to shock the judicial conscience. That the jury was not improperly biased against the Munns is evident in its award of $10,000.00 for Mrs. Munn's eight hours of pain and suffering. Furthermore, its decision to deny the wrongful death beneficiaries any compensation reflects a reasoned application of the avoidable consequences doctrine. In addition, the jury's refusal to award Munn any pain and suffering damages mirrors the relatively minor nature of his injuries.

It cannot be plausibly argued that the jury's award is so inadequate as to shock the conscience. Consequently, we affirm the court's denial of this aspect of his new trial motion.

E. *Jury Instructions.*

Munn asserts that the court erroneously instructed the jury in two ways: (1) by directing the jury to judge the reasonableness of Mrs. Munn's decision to refuse blood against an objective standard; and (2) by refusing to inform the jury of the identity of the potential wrongful death beneficiaries. The court's instructions were appropriate in both regards, and we therefore affirm.

During the jury instruction conference, Munn's counsel urged the court to direct the jury to ask what a reasonable Jehovah's Witness would have done in Mrs. Munn's situation. The court refused to adopt this instruction, instead instructing the jury in a way that defies easy categorization as "objective" or "subjective":

> In determining whether or not Elaine Munn's decision to refuse the blood transfusion was unreasonable, you may consider that the blood transfusions were medically recommended. But, you may also consider her religious beliefs and related teachings, together with the known risks of blood transfusions, if you find that to be a factor in her decision.

Both parties blithely conclude that this language reflects an "objective" standard of reasonableness. However, this standard is not purely objective; it does not ask the jury whether reasonable people would have done what Mrs. Munn did. It contains a subjective component, allowing the jury to "consider her religious beliefs and related teachings."

In any event, the proper characterization of this instruction is not the issue at hand; instead, the question is whether the instruction was wrong as a matter of Mississippi law. This instruction does not incorrectly state Mississippi law. More precisely, Mississippi cases considering the avoidable consequences doctrine do not prohibit this instruction. *See Buras v. Shell Oil Co.*, 666 F. Supp. 919, 924 (S.D. Miss. 1987) (applying Mississippi law); *National Dairy Prods. Corp. v. Jumper*, 241 Miss. 339, 130 So. 2d 922, 923 (1961); *Levy v. J.A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296, 298 (1959); *North Am. Accident Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528 (1937).

None of these cases clearly indicates whether an objective or subjective standard of reasonableness should be applied; however, once again, that is not really the issue here, because the court's instruction in this case does not plainly reflect either of those

paradigms. The above-cited cases either combine objective and subjective elements (as does the instruction in this case) or fail to specify which standard is to be applied.

For example, in *Buras* the court declared that a plaintiff "is required to take reasonable **[579]** steps to mitigate his damages." 666 F. Supp. at 924. This "answer" to the objective vs. subjective debate begs the question. Most other cases similarly fail to address the question. *See, e.g., National Dairy*, 130 So. 2d at 923 ("[o]ne seeking to hold another liable for damages must use reasonable efforts to avoid or mitigate them"); *Levy*, 115 So. 2d at 298 (plaintiff required to "put[ ] forth a reasonable effort" to mitigate damages).

Some cases do apply a standard of reasonableness that is "subjective" in the sense that the nature of the plaintiff is taken into account. In *Henderson*, the plaintiff sought damages for his continuing physical disability, even though surgery would have enabled him to return to work and thus mitigate his damages. The plaintiff argued that he was unable to pay for the operation, and the defendant responded by asserting that the plaintiff's financial condition was not relevant to the reasonableness of his failure to mitigate damages.

The Mississippi Supreme Court rejected this position, stating that the mitigation of damages rule is "one of reason, and, if the injured person be powerless to take the needed step, reasonableness

has become exhausted and the applicability of the rule is at an end."[18] 177 So. at 530. Although *Henderson* effectively jettisons the notion that Mississippi has a purely objective standard of reasonableness,[19] it does not render erroneous the district court's instruction, which did not contain a purely objective standard. The instruction allowed the jury to consider factors unique to the decedent, such as "her religious beliefs and related teachings." Hence, because the instruction comported with Mississippi law, the district court's judgment in this regard is affirmed.[20]

Munn also contends that the court should have informed the jury that the Munn children would be the primary beneficiaries of any wrongful death damages it awarded. Munn argues that the jury assumed that he would be the sole recipient of these damages and thus that the interests of the children were unfairly prejudiced.

This argument is utterly without legal foundation. The Mississippi wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 1990), does not require that the jury know the identity of the

18. Incidentally, Munn could argue that Mrs. Munn was "powerless" to mitigate her damages. However, she was not "powerless" to accept blood transfusions in the sense that the plaintiff in *Henderson* was "powerless" to pay for the operation. There is a difference between hard choices and physical impossibility.

19. At the same time, however, neither *Henderson* nor any other Mississippi case mandates a purely subjective approach to reasonableness.

20. That Mississippi law allows a court to permit a jury to consider personal attributes in determining reasonableness does not in any way undermine our observation that jury consideration of religious beliefs may violate the establishment clause.

beneficiaries. Munn fails to suggest any legal basis for this argument, and it accordingly must fail.

The judgment of the district court is in all respects AFFIRMED.

BARKSDALE, Circuit Judge, specially concurring:

I concur in affirming the judgment and all of the opinion except Part III.A. (Admissibility), which holds that the district court abused its discretion in permitting Mr. Munn to be cross-examined about certain aspects of the Jehovah's Witness faith. I do not find that it did; the evidence was relevant to the doctrine of avoidable consequences—the key issue at trial. Moreover, for certain of the questions in issue, it does not appear that Munn made the requisite Fed. R. Evid. 103(a)(1) objection. Nor did the scope of cross-examination violate Fed. R. Evid. 611(b); among other things, it was responsive to Mr. Munn's direct testimony.

ALVIN B. RUBIN, Circuit Judge, dissenting:

The personal-injury and wrongful-death claims of two black Jehovah's Witnesses from Tennessee were being tried before a predominantly white jury in Clarksdale, Mississippi. Judge Smith correctly finds **[580]** that the trial court erred in admitting irrelevant evidence that was calculated to evoke the jury's prejudices, but concludes that this inflammatory effort by counsel and error by the trial court did not affect a substantial right of the plaintiffs. In my opinion, this commits a legal error both because it equates effect on a substantial right with the likelihood that a different verdict would have been reached had the evidence been excluded and by substituting a judge's personal view of the effect of the evidence for the evaluation of its possible impact in this case before this jury: it

minimizes the potential consequences of the deliberate appeal to religious prejudice and to chauvinism permitted by the trial court. Judge Barksdale's concurrence ignores the calculated inflammatory effect of the cross-examination on the views of other members of the Jehovah's Witnesses' faith as well as the prejudicial effect far beyond probative value of the examination on the personal beliefs of the plaintiff-witness. I therefore respectfully dissent.

I

The majority opinion carefully relates most of the facts. It recites some, however, in bland generality. The record contains the following specifics:

Ray James Munn and his wife, both blacks, were residents of Tennessee. Ms. Munn was critically injured in an automobile accident in Mississippi by a vehicle driven by Trudy Algee, a white resident of Mississippi. After Ms. Munn's death, her husband could file suit only in Mississippi because Algee, an individual, was a resident of that state and did not do business in Tennessee. Instead of suing in state court, he invoked the constitutional and statutory grants of diversity jurisdiction, designed to protect nonresidents from the possible prejudice of state courts, to file suit in the United States District Court for Northern District of Mississippi, on his behalf and on behalf of Ms. Munn's three children.

Algee admitted liability, so the trial was only to determine damages. The case was tried before a jury of six; five of the jurors were white, one was black. Algee used all three of her peremptory challenges to exclude blacks.

The trial began on August 21, 1989, in Clarksdale, Mississippi. Two months earlier, on June 21, the Supreme Court in *Texas v. Johnson*[1] had reversed a state conviction for flag burning because the statute infringed first amendment rights. This event had evoked widespread publicity, both in print and on television. The Flag Protection Act, a federal bill to punish any desecration of the flag had been introduced in Congress on July 24, and was the subject of national publicity at the time of trial.

Munn testified both on direct and on cross-examination that he and his wife were Jehovah's Witnesses, that his wife had refused to take a blood transfusion because of her religious beliefs; that, after she lost consciousness, he rejected a transfusion because she and he both believed that, "even if it meant dying, you would not take that risk [of a blood transfusion] however small it was;" and that, "We don't waiver in our faith."

Counsel for the defendant then proceeded to cross examine him not on his or his wife's personal beliefs or faith, or on reasonableness of their opposition to transfusions, but on the general beliefs of those who profess to be Jehovah's Witnesses. Part of the cross-examination follows:

Q. Let me ask you this. Isn't it true that the Jehovah Witnesses' faith adheres to the belief that Christ returned to earth in 1914 and has invisibly ruled since that time through the Watchtower?
A. Through the organization here.
Q. The organization is the Watchtower?
A. Well, not the Watchtower. It's the one, the governing body of the Jehovah's Witnesses--of where the magazines come from.

1. 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Q. It is the belief in accordance with that of Jehovah's Witnesses that since Christ returned in 1914 there will not be a resurrection but there will be ultimately **[581]** Armageddon and after Armageddon Christ will begin his ruling of the millennium and the Jehovah's Witnesses will be spared that and all others will be eternally damned; isn't that the belief of the Jehovah's Witnesses?

A. You stated that well.

Q. Is it the belief of the Jehovah's Witnesses that there is no hell for the wicked; the wicked will merely be annihilated?

A. That's what the scripture [sic] say.

Q. It is the belief of the Jehovah's Witnesses that man has no soul, and when man dies that the soul was merely a manifestation for the body during life; isn't that true?

A. Well, the soul is the breath and the life force combined along with it.

Q. It is the belief of the Jehovah's Witnesses that followers of Jehovah's Witnesses are not members of any earthly kingdom?

A. Well, you didn't state that correct.

Q. How would you state it?

A. There is—we—it's not an earthly kingdom. Christ is his invisible presence from the Scriptures ruled from the heaven, the heavenly kingdom, not an earthly kingdom.

Q. Is it based on that premise that Jehovah's Witnesses are, for instance, conscientious objectors toward service to their country; isn't that true?

A. Say that again.

Q. *It is based on that premise of followers of this religion not being servants to any earthly kingdom upon which Jehovah's Witnesses base their belief that they are conscientious objectors and therefore do not do service to their country, like going to war?*

A. *No, we don't go to war.*[2]
Q. Is my statement correct?
A. Right. We don't go to war.
Q. *It is on that same premise, or stated differently, that Jehovah's Witnesses, for instance, don't salute the flag because that would be ascribing salvation to the flag; isn't that true?*
A. *Right. We don't salute the flag*[3].

Counsel for Algee also delved into another matter:

Q. It is also the teachings of the Jehovah's Witnesses faith that it is a sin against God to live together outside of wedlock, isn't it?

* * * * * *

Q. Included in the material that you have brought into court and that you referred to yesterday on direct examination, if you will turn to the page that I have the yellow tab on, please, sir. It is also the beliefs and teachings of Jehovah's Witness faith that a man and woman do not live together prior to marriage, isn't it?
A. That's right.
Q. But you and Mrs. Munn lived together prior to marriage, didn't you, in violation of the Scriptures and your teachings?
A. At the time I met her—
Q. Go ahead and answer yes or no, first, and then you may explain.
A. Yes, we did. Now, let me explain. When I met her she was not in the organization. As I explained to you earlier how someone is disciplined for certain things and if they show no

2. Emphasis added.

3. Emphasis added.

sign of repentance, at that time they're disfellowshipped, she had left the organization when I met her. And I was not in the organization, didn't know anything about the organization. For a short period of time we did live together, but she did repent and go back into the organization. And I, myself, became a Jehovah's Witness.

Q. Are you saying that at the time you met her she had been disfellowshipped for some other transgression?

A. She had.

Counsel for Algee was careful to remind the jury of the Munns' sinful conduct in his closing argument. None of this, of course, **[582]** had any probative value whatever as to any issue before the jury.

II

Judge Smith agrees with me that the admission of this testimony was error. Indeed, considering who the parties were, the time and place of the trial, and the patent irrelevance both of the beliefs of other members of Munn's faith and the Munns' premarital relations, the error was in my opinion egregious. He concludes, however, that the effect of this evocation of patriotic passion, religious prejudice, and bias against premarital sexual conduct is completely dissipated because its admission did not affect a substantial right of the Munns.

Upon examining this method of analysis—rather than the standard of review the opinion dutifully recites—it is apparent that Judge Smith believes that Federal Rule of Evidence 103 requires an appellant complaining of evidentiary errors to demonstrate somehow that the exclusion of inadmissible evidence would have changed the

result.[4] That is not the criterion set forth in Rule 103. We can never know whether, in the absence of error, the result *would* have differed; if that is what we require, then no appellant will ever be able to demonstrate prejudice from a trial error unless the error is so plain that the verdict is wrong as a matter of law. The question Rule 103 requires us to ask in civil cases is whether there is a realistic possibility that the error had more than a de minimis effect on the verdict.

The Supreme Court's decision in *Kotteakos v. United States*[5] still provides the seminal discussion of harmless error analysis. *Kotteakos* puts the test for whether a trial error is harmless in the negative. Paraphrased, the appellate court must be able to say "with fair assurance, after pondering all that happened . . . that the judgment was not substantially swayed by the error."[6] The inquiry is not "merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand."[7]

As the *Kotteakos* Court explains, the purposes of the harmless error rule, as applied to all trial errors, not just evidentiary rulings,[8]

4. At ___ __ ___, at 572-574.

5. 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

6. Id. at 765, 66 S. Ct. at 1248.

7. Id.

8. 28 U.S.C. § 2111 (1988); Fed. R. Civ. P. 61; Fed. R. Crim. P. 52(a); Fed. R. Evid. 103(a).

are "simple[:] to substitute judgment for automatic application of rules," and to "preserve review as a check upon arbitrary action and essential unfairness in trials" without providing loopholes through which a litigant may escape the verdict in a fairly conducted trial.[9] If harmless-error review is faithfully to serve those purposes, then the reviewing court must keep firmly in mind the context in which its inquiry takes place. In determining whether an error is harmless, it is not the function of the appellate court to speculate on the probable result of a new trial. "Those judgments are exclusively for the jury."[10] Thus, error cannot be deemed harmless solely because the reviewing court believes that the trial court reached the correct result in spite of the error.[11] Rather, the focus of the inquiry is "*what the error meant to the [jury],* not singled out and standing alone, but *in relation to all else* that happened."[12] "[E]rror is not to be viewed in an attitude separate from reality and oblivious to the context of the record."[13] The judge must not equate the fact-trier's reactions with his own, but **[583]** must allow for how others might react, within the bounds of reason.[14]

9. *Kotteakos*, 328 U.S. at 759-60, 66 S. Ct. at 1245.

10. Id. at 763, 66 S. Ct. at 1247.

11. *See* 11 C. Wright & A. Miller, Federal Practice & Procedure § 2883 at 278-79 (1973).

12. *Kotteakos*, 328 U.S. at 764, 66 S. Ct. at 1248 (emphasis added).

13. *United States v. D'Antonio*, 362 F.2d 151, 155 (7th Cir.), *cert. denied*, 385 U.S. 900, 87 S. Ct. 204, 17 L. Ed. 2d 131 (1966).

14. *Kotteakos*, 328 U.S. at 764, 66 S. Ct. at 1247.

Kotteakos, of course, was a criminal case, and the Supreme Court has recognized that the harmless-error analysis conducted in criminal cases may be in some respects more stringent than harmless-error analysis in civil cases.[15] Nevertheless, this circuit has articulated a standard in civil cases substantially similar to that employed in *Kotteakos*: We must reverse unless we are "'*sure,* after reviewing the *entire record,* that the error *did not influence* the jury or had but a *very slight* effect on its verdict.' "[16] It seems to me that one could only be "sure" of that if it appears from the record that there is no realistic possibility that the error had more than a de minimis effect on the verdict.

With that standard in mind, some would contend that, given the conditions under which this case was tried, errors like those committed in this trial warrant reversal per se.[17] Ms. Algee had admitted her liability. The jury was called upon to decide only the damages due Mr. Munn and his wife's children. In doing so, the jurors were asked to make four necessarily subjective determinations: (1) Whether Ms. Munn's refusal to take blood was reasonable; (2) What portion of Ms. Munn's damages were attributable to her unreasonable refusal to take blood; (3) What amount of damages would compensate Ms. Munn's estate for her pain and suffering; and (4) What amount of damages would compensate Mr. Munn for his pain and suffering. The jury's sympathy for or antipathy to the

15. Id. at 762-63, 66 S. Ct. at 1246-47.

16. At 573 (quoting *Pregeant v. Pan Am. World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir. 1985)).

17. *Cf.* Note, Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine, 64 Ind. L.J. 375 (1989).

Munns might substantially affect their decision on each of these issues. I therefore see no way that a reviewing court could be "sure"—other than by substituting its own views for those of the jury or by inventing some post-hoc rationalization for the verdict—that Algee's appeal to the jury's religious prejudice and nationalism "had but slight effect" on the verdict. In this case, however, we need not go so far as to find error per se. Under the traditional analysis, this error could not have been harmless.

III

The interrogatories submitted to the jury with respect to Ms. Munn and the jury's answers follow:

1. What amount of damages do you find plaintiff has proven by a preponderance of the evidence to have been incurred by Elaine Munn up to the time of her death for pain and suffering and mental anguish?

   $10,000.00.

2. Do you find that defendant proved by a preponderance of the evidence that Elaine Munn would have survived had she accepted the blood transfusions?

   Yes.

3. Do you find that defendant has proved by a preponderance of the evidence that Elaine Munn's refusal of blood transfusions was unreasonable?

   Yes.

4. Do you find that the original injuries sustained by Elaine Munn combined with her unreasonable refusal of blood to cause her death?

Yes.

If your answer to this interrogatory is "Yes," what percentage did Elaine Munn's unreasonable refusal of blood contribute to her death?

100 percent.

No special interrogatories concerning Mr. Munn were submitted to the jury.

I do not understand the statement that "Munn failed to articulate any substantial right affected by this evidence's admission."[18] I cannot imagine a more explicit articulation than Munn's claim that the evidence "poisoned the minds of the jury [sic] from the outset," thus preventing him from **[584]** obtaining an impartial assessment of the damages due. The inquiry, then, must focus on whether there was any realistic possibility that counsel for Algee succeeded in his calculated effort to "poison" the minds of the jurors and to affect their verdict through the erroneously admitted evidence.

Patently, it seems to me, the jury's view of whether Ms. Munn and her husband were honest, sincere, and responsible members of the community *might* have affected the amount of damages it awarded for Ms. Munn's pain and suffering before death, its view that her refusal of blood transfusions was or was not reasonable, and its evaluation of the conflicting testimony concerning whether her

18. At ____, at 573.

refusal to accept a transfusion was either the sole or even *a* cause of death. Judge Smith does not even intimate a different view. Instead, because he finds the verdict to be within what he considers a reasonable range, he grants absolution for the error.

Apparently, neither of my brothers accepts the view that any lawyer who has tried personal injury cases considers fundamental: the sympathy or disaffection the jury has for the victim affects the amount of damages. The Civil Trial Manual, published jointly by the American College of Trial Lawyers and the ALI-ABA Committee on Continuing Legal Education, speaking of the opening statement, says:

> The force of the lawyer's efforts here should be to get the jury to think with him and to be favorably inclined toward his client, disclosing his age, occupation, marital status, number of children, if any, and so forth. The image of plaintiff or defendant as a hardworking family man or a devoted mother and housewife will give the jurymen an image to which they can relate.[19]

Dozens of other works instructing lawyers on the trial of cases give the same message.[20]

19. R. Figg, R. McCullough, III, and J. Underwood, *Civil Trial Manual* 397-98 (1974).

20. *See, e.g.*, A. Julien, *Opening Statements* § 6.06 (1980); F. Lane, *Goldstein Trial Techniques* § 10.45 (1984); M. Roberts, *Trial Psychology* 106-07 (1987); T. Sannito & P. MacGovern, *Courtroom Psychology for Trial Lawyers* 67 (1985); L. Smith & L. Malandro, *Courtroom Communication Strategies* § 7.28 (1985); J. Warsaw, *Masters of Trial Practice* §§ 3.11, 6.12, 15.4 (1985).

Instead of asking whether, absent the tainted testimony the jury might have awarded more, Judge Smith observes that the error did not result in an absurdly low verdict. "For approximately eight hours of pain and suffering, the jury awarded $10,000.00, *an amount not so small as to arouse suspicion as to the jury's motives.*"[21] Yet the jury might have awarded a much larger amount. Apart from whether her death might have been averted, Ms. Munn suffered for eight hours from severe injuries. Her pelvis was fractured in two places. Her ribs were broken. She was bleeding profusely internally and suffered extensive internal bruising. Her physicians inserted a tube in her chest. They cut open her abdomen to insert lavage fluid. They cut open her chest and spread her ribs eight inches apart to clamp a lacerated artery.

The inadmissible evidence may well have induced the jury to award *only* $10,000. The issue is not whether the verdict arouses suspicion, but whether the Munns' substantial rights were *affected*, a much different question. Webster's Seventh New Collegiate Dictionary, defines the verb "affect" to mean "to produce an effect upon, to produce a material influence upon or alteration in, [or] to make an impression on." That is all Munn must demonstrate to show prejudice. He does *not* have to show that the jury acted with evil or even questionable intentions.

In like fashion, Judge Smith concludes that awarding Munn *nothing* for his own pain and suffering "most likely" reflects the relatively minor nature of his injuries. This conjectural determination of probability takes no account of the other possibility that I consider likely and with which I think most lawyers would agree:

21. At ____, at 574.

that a **[585]** jury who considered Munn a patriotic, moral, sensible, and sympathetic person might well have awarded him thousands of dollars for the same infliction. None of us who sit on this court are virgins at the bar. We have all seen, and some of us have affirmed, substantial verdicts for "bruises and contusions." Indeed, I can conceive of no reason but general dislike of the plaintiff for a jury to award medical expenses against an admittedly liable defendant, but to award nothing for pain and suffering when the uncontroverted evidence was that Munn suffered pain and general discomfort from his "bruises and contusions" for several months.[22]

Judge Smith continues to pile a Pelion of conjecture upon an Ossa of speculation: "the jury's failure to award *any* wrongful death damages is the *most plausible*" explanation of its verdict; "the jury *most likely* refused" wrongful death damages "because it believed that Ms. Munn would have lived had she taken blood transfusions"—despite the fact, mentioned in a footnote, that one doctor testified that she would have died even had she done so, and another that there was a "75% possibility" that this would have occurred.[23]

At most, the opinion demonstrates only that the admission of the prejudicial testimony *may* have been harmless. Justice Frank-

22. *Cf. Comeaux v. Poindexter*, 527 So. 2d 1184 (La. App. 3d Cir. 1988) ($250 damages for pain and suffering for "minor contusions"); *Vidrine v. Government Employees Ins.*, 528 So. 2d 765 (La. App. 3d Cir. 1988) ($600 damages for pain and suffering for "minor injuries"); *Soudelier v. Miller*, 537 So. 2d 296 (La. App. 1st Cir. 1988) (four plaintiffs recovered damages for pain and suffering in the amount of $2500, $250, $250 and $500 respectively for "minor injuries"). *See generally*, Quantum Study, 35 Loy. L. Rev. 1151 (1990).

23. At 573 & n. 7.

furter said that we as judges should not be ignorant of what we know as men.[24] Nor should we disregard what we know as experienced lawyers. We know that persuading the jury of the good character of the plaintiffs is likely to enhance their verdict, and that portraying them unfavorably tends to decrease it. Anecdote has it that the late Sammy Davis Jr., when about to play golf, was asked, "What is your handicap?" He replied, "I'm black, one-eyed and Jewish, and you still want to know my handicap?!" The Munns were quadruply handicapped—black nonresidents adhering to an unpopular faith, some of whose members were unpatriotic, trying a case before a north Mississippi jury, five of whose six members were white.

Judge Smith concludes that inducing this predominantly white Mississippi jury to believe or at least to infer that the Munns believed that Christ returned to earth in 1914 and has invisibly ruled since that time, that there will not be a resurrection but that the jury (like all others ever on earth save Jehovah's Witnesses) will be eternally damned, that Munn believes man has no soul, that Munn is a conscientious objector who will not expose himself to the dangers inherent in military service even when the nation is threatened, that the Munns even refuse to salute the flag, and that they lived together in adultery prior to their marriage all likely had no effect on the Munns' substantial rights. Judge Barksdale would go further and hold the testimony admissible. This to me, with all respect to both of my brethren, is contrary to the universal knowledge and experience of trial lawyers and judges, and to the human disposition to favor those we like and to discountenance those we

24. *Watts v. Indiana*, 338 U.S. 49, 52, 69 S. Ct. 1357, 1357, 93 L. Ed. 1801 (1949).

disfavor. Algee's lawyer deliberately threw the proverbial skunk of inadmissible evidence into the jury box. No amount of conjecture that the jury *might* not have smelled the stink can undo the odor that, even now, permeates the record. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Ray James MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs and Wrongful Death Beneficiaries of Elaine Munn, Deceased, *Plaintiff*,

Southern Health Plan, Inc., d/b/a IPA Apple Plan, *Intervening Plaintiff*,

v.

Trudy E. ALGEE, *Defendant*.

No. DC87-124-S-O
Feb. 8, 1990.
[730 F. Supp. 21]

Phil Zerilla, Jr., Memphis, Tenn., for plaintiff.
John I. Houseal, Jr., Memphis, Tenn., for intervening plaintiff.
Gary K. Smith, Memphis, Tenn., for defendant.

[22] OPINION

SENTER, Chief Judge.

This action was brought to recover for the wrongful death of the plaintiff's wife as well as the plaintiff's own personal injuries.

The matter was tried to a jury which returned a verdict for the plaintiff in the amount of $20,411.67 as compensation for the medical bills incurred by his wife and for the suffering she endured prior to her death. The jury further found that the death of plaintiff's decedent was 100 percent attributable to her refusal of a blood transfusion and therefore awarded no damages for wrongful death. The jury also awarded the plaintiff $241.44 for medical expenses incurred in the treatment of his own personal injuries, but awarded nothing for pain and suffering. The case is now before the court for consideration of the plaintiff's motion for a new trial. The plaintiff raises ten separate grounds in support of his motion for new trial.[1]

Factual Background

The basic facts of this case were never disputed by the parties. The plaintiff's decedent was seriously injured when the car in which she was riding was struck by a vehicle driven by the defendant. The cause of the accident was the defendant's negligent attempt to pass a tractor-trailer rig in very dense fog. The plaintiff was also injured in the accident. The plaintiff's decedent was taken to the emergency room at a regional trauma center where she died during surgery after refusing to accept a blood transfusion. One of the reasons for **[23]** refusing blood transfusions was the Jehovah's Witness religion beliefs of plaintiff and his wife. The only questions which necessitated trial were whether death was avoidable, whether the refusal of blood was unreasonable, and the amount of damages.

1. The plaintiff enumerates eleven grounds. For purposes of this opinion, the first two will be discussed together.

Analysis of Plaintiff's Points of Error

An earlier opinion which addressed many of the legal problems presented by this most unusual case was published *sub nom. Munn v. Southern Health Plan*, 719 F. Supp. 525 (N.D. Miss. 1989). However, following entry of that opinion, the court reconsidered certain portions of it and altered its holding as to recovery of damages in a case where the doctrine of avoidable consequences applied and the arguably avoidable consequence was death. One of the points of error raised by the plaintiff concerns the instructions which the court gave to the jury on what damages were recoverable. The court will address this argument first because it presents the best opportunity to set forth the substance of the court's amendment of the earlier opinion.

The plaintiff contends that the court erred by not instructing the jury that the plaintiff could recover for losses which his wife would have sustained had she taken the transfusion and lived. In its earlier opinion, this court had ruled that such damages were not recoverable if the jury found that Mrs. Munn could have avoided her death by accepting the transfusion and that the refusal to accept the transfusion was unreasonable under the circumstances. The reasoning was that if the death was an avoidable consequence of the defendant's negligence, then the defendant was not liable to pay damages under the wrongful death statute and recovery under the survival statute was limited to those damages which accrued prior to the death of the decedent. *Id.* at 530-32.

As the day of trial approached, the court became increasingly concerned that this approach was unfair. There can be little doubt that in cases such as this, the original act of negligence continues to operate as a cause in fact of the death of the decedent. Of course,

cause in fact is not synonymous with legal or proximate cause. In the earlier published opinion, the court noted that the doctrine of avoidable consequences which was to be applied in this case "focuses only on the measurement of damages" and is not concerned with questions of proximate cause. *Id.* at 527. However, the court later declined to decide whether the "failure to take reasonable steps to avoid the consequences of an injury acts as an intervening cause so that the defendant's original act of negligence may no longer be viewed as the proximate cause of the avoidable injury, even though it is clearly an actual, contributing cause." *Id.* at 531 n. 3. There is a split of authority among the commentators on this point. At first blush, this appears to be an argument that only an academician could love. There seems to be no practical difference between the assertion that the plaintiff's avoidable injuries were not proximately caused by the defendant's negligence and the statement that the plaintiff cannot recover from the defendant for any losses which the plaintiff could reasonably have avoided, even though the losses were proximately caused by the defendant's negligence. Either way you view the problem, the plaintiff's right to recover, and therefore the defendant's liability, is limited to those damages which may be attributed to injuries which were not avoidable. However, in this case the distinction could make a difference.

The Mississippi Supreme Court recognizes that there may be more than one proximate cause of an injury. *Monroe County Electric Power Ass'n v. Pace*, 461 So. 2d 739, 746 (Miss. 1984). A defendant's negligence need only proximately contribute to the injury in order for the defendant to be held liable. The same rule applies in wrongful death cases. *Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935) (negligence complained of must be at least directly contributing cause of death). Thus, if the unreasonable

failure to accept medical treatment which leads to an avoidable **[24]** death is not viewed as a superseding[2] cause of the death, the original act of negligence is a proximate cause of the death and some amount of damages should be recoverable under the wrongful death statute.

Whether proof of an avoidable consequences defense goes to the question of legal causation or merely to the question of what damages are recoverable is an issue which the Mississippi Supreme Court has never addressed. However, that court has defined the concept of superseding cause.

> [W]here an act of negligence is a substantial factor in bringing about an injury, it does not cease to be a legal and proximate cause thereof because of the intervention of a subsequent act of negligence of another which contributed to the injury, if the prior act of negligence is still operating, and the injury inflicted is not different in kind from that which would have resulted from the prior act.

Solomon v. Continental Baking Co., 172 Miss. 388, 160 So. 732, 733 (1935). Under this definition, it is clear that the injured party's unreasonable conduct in an avoidable consequence case is not a superseding cause of the ultimate injury. There can be no doubt that the defendant's prior act of negligence is still operating in such a case. In fact, the defendant's argument in a case such as this is that

2. Throughout the course of this opinion, the court uses the phrase "superseding cause" as a shorthand form of the phrase "intervening cause sufficient to break the chain of causation which runs from the original act of negligence to the injury". The older Mississippi cases refer to this concept as an "efficient intervening cause".

although the additional injury occurred as a natural consequence of her negligent act, she should not be required to pay damages for that injury which the plaintiff could have avoided.

It might be argued in this case that death is an injury different in kind from the physical injury which would have resulted from the defendant's negligent act. However, the focus should be on whether the harm which did result was of a different kind from that which was likely to result from the defendant's conduct. *See Restatement (Second) of Torts*, § 451(b) (1965). The death of persons in cars traveling in the opposite direction was one of the likely consequences of the defendant's attempt to pass in dense fog which made that attempt an act of negligence.[3] Perhaps more important in this determination is the fact that the notion of superseding cause applies only when the intervening act or event is the act of a third person or a natural force. *Restatement (Second) of Torts*, §§ 440 et seq. (1965); *Brewer v. Town of Lucedale*, 189 Miss. 374, 198 So. 42 (1940). Other principles, such as contributory negligence, assumption of the risk, and the doctrine of avoidable consequences, apply when the intervening act is an act of the tort victim.

3. On occasion, the Mississippi Supreme Court has applied a "but for" analysis to determine whether an intervening act of negligence superseded the original act of negligence. In *Holmes v. T. M. Strider & Co.*, 186 Miss. 380, 189 So. 518 (1939), the court held that where the intervening act of negligence by itself would not have caused the plaintiff's injury, but did so only when combined with the effects of the original act of negligence, the second act was not a superseding cause of the plaintiff's injury. Under this analysis, it is abundantly clear that the refusal to accept the blood transfusion would not be considered a superseding cause of Mrs. Munn's death.

Following the logic of the above reasoning, the court refused to give a superseding cause instruction to the jury. In further reliance on its conclusion that the principle of superseding cause did not apply in this case, the court instructed the jury that even if it found that Mrs. Munn's death was avoidable and that her refusal of the blood transfusion was unreasonable, it could still award the plaintiff wrongful death damages, if it further found that the defendant's negligence was a contributing cause of Mrs. Munn's death.[4]

[25] Once the initial hurdle of determining that the plaintiff may sue under the wrongful death statute is cleared, the difficult task of determining what damages are recoverable must be resolved. In its initial opinion, the court rejected the plaintiff's argument that he

4. Some mention should be made of one other possible disposition of the question of the application of the avoidable consequences defense in a wrongful death case. Because the doctrine holds that a defendant should not be required to pay damages which could have been avoided by the plaintiff, some courts have held that if the damages which would have been incurred if the plaintiff followed the course of action which the defendant contends was reasonable are greater than the damages which were actually incurred because of the plaintiff's failure to follow the recommended course, then the doctrine would not apply at all. In a wrongful death case, if the defendant failed to prove that wrongful death damages were greater than the damages which would have been incurred by the tort victim had she accepted the proposed medical treatment and lived, then the defendant would have failed to prove the applicability of the defense. In that case, the matter would proceed as a straightforward wrongful death case. On the other hand, if the defendant established the applicability of the defense, the court would have exactly the same problem which this court faced. This idea was rejected by this court because of the tremendous problems of proof involved and because it would lead to the application of the defense in some wrongful death cases, but not in others.

should be allowed to recover for those injuries which Mrs. Munn would have suffered even if she had taken the transfusion and lived. The court's refusal to so instruct the jury is now assigned as error. The court is still of the opinion that the allowance of such damages would be improper. Several of the elements of damage sought by the plaintiff were never actually suffered by the deceased. These include the pain and suffering which the plaintiff would have experienced had she survived and the medical bills which she would have incurred. Other elements could have been supported only by highly speculative testimony. For these reasons, the court decided that the more equitable approach was that taken by the Florida Court of Appeals in *McCoy v. Hollywood Quarries, Inc.*, 544 So. 2d 274 (Fla. Dist. Ct. App. 1989). A full explication of that court's holding requires some regression.

In an earlier case, the Florida Supreme Court had adopted the seat belt defense, allowing the defendant in an automobile accident case to raise as a defense the plaintiff's failure to use a seat belt. *Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984). The seat belt defense has been the subject of great debate in the various state courts. Some courts have rejected the defense outright. Those which have allowed it have split on the question of the proper theory under which it should be allowed. Some courts have treated it as a type of contributory negligence, while others have allowed the defense as a variation on the doctrine of avoidable consequences. The defense fits neatly under neither theory. The Florida Supreme Court rejected the contributory negligence approach, holding that the jury should not be allowed to consider the nonuse of a seat belt on the issue of liability, unless there was proof that the failure to buckle up was a proximate cause of the accident. *Id.* at 453-54. Instead, the court applied a modified form of the

doctrine of avoidable consequences, allowing the jury to apportion damages if it found that the plaintiff had unreasonably failed to use an available seat belt and that this failure had resulted in enhanced injury to the plaintiff. *Id.*

Two years later, the United States District Court for the Middle District of Florida was called upon to apply the *Pasakarnis* rule in a case where the arguably avoidable consequence of nonuse of a seat belt was death. *England v. United States*, 632 F. Supp. 1340 (M.D. Fla. 1986). As this court noted in its earlier opinion, there was no cause of action for wrongful death at common law. *Munn*, 719 F. Supp. at 530. Wrongful death statutes were adopted by many states for the purpose of avoiding the inequity which existed when the state of the law was such that a tortfeasor could be held liable for injury short of death which was proximately caused by his negligence, but walked away without liability if his victim died. The district court held in *England* that this purpose would be defeated if the seat belt defense were allowed in a case where the defendant contended that death would have been avoided if the deceased had used his seat belt. *England*, 632 F. Supp. at 1342-43. For this reason, the court refused to allow the defense in a wrongful death case. *Id.*

[26] Finally, we return to the point of beginning—the *Hollywood Quarries* decision. In that case, the Florida Court of Appeals rejected the result reached in *England*, noting that under *Pasakarnis* the seat belt defense would not necessarily be an absolute bar to recovery in a wrongful death case. The court went on to hold that the defense would operate in a wrongful death case exactly the same way it was applied to the personal injury action in *Pasakarnis*. Thus the jury was instructed that if it found that plaintiff's decedent

could have avoided death by using an available seat belt and that the failure to use the belt was unreasonable under the circumstances, then the jury was to determine that portion of the plaintiff's wrongful death damages which were to be attributed to the nonuse of the seat belt. The plaintiff's damages were then reduced by that percentage.

These cases provide an apt analogy to the facts of this case. When the arguably avoidable consequence is death, it is patently unfair to limit the tort victim's recovery to compensation for those injuries actually incurred prior to the avoidable death. At the same time, it is equally unfair to require the defendant to pay the full panoply of wrongful death damages, since, although the death was proximately caused by the defendant's wrongful act, at least a portion of the resulting damages is attributable to the refusal of appropriate medical care. The solution to this problem set forth in *Hollywood Quarries* is a reasonable one.

In a case where federal jurisdiction is based on diversity of citizenship, the district court sits as a state trial court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In a case where there is no official pronouncement of state law on an issue which the district court must decide in order to conclude the case, the district court must make an *Erie* guess as to how the courts of that state would rule on the issue. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986). Although this court should be more reluctant to extend Mississippi law than a state trial court would be, when an issue is squarely presented, the court cannot refuse to address it. In reaching the conclusion that it has reached in this case, the court considered the fact that Mississippi is

a pure comparative negligence state.[5] *See* Miss. Code Ann. § 11-7-15 (1972). Mississippi courts and juries are quite comfortable with apportionment of damages in cases involving negligence by the plaintiff. Mississippi's preference for the pure variety of comparative negligence certainly is evidence of this state's desire that tort victims be fully compensated for any injury that resulted from the tortfeasor's negligent act. In fashioning the scheme employed in this case, the court attempted to act in keeping with that desire. Thus, the jury was instructed in the instant case that it was to determine the percentage of the plaintiff's damages which were attributable to the decedent's refusal of a blood transfusion. The plaintiff's motion for new trial on the ground that the court should have instructed the jury that the plaintiff could recover for all injuries which his wife would have sustained had she taken the transfusion and lived will be denied.

The plaintiff also contends that a new trial should be ordered because the jury's award was inadequate.[6] In order for this court to grant a new trial on that ground, the court must find that the award was so "'inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption

5. As this court is using the term, a pure comparative negligence statute is one that allows the finder of fact to apportion damages or liability regardless of the percentage of fault assigned to the plaintiff. Under Mississippi's statute, if the plaintiff were found to be 99 percent at fault, he could recover from the defendant 1 percent of his damages.

6. Because the contention that the inadequacy of the award mandates a new trial requires the court to consider whether prejudice played a part in the jury's decision, this point will be considered in conjunction with the plaintiff's argument that the jury was prejudiced against him.

or other improper cause invaded the trial.'" *Taylor v. Green*, 868 F.2d 162, 164 (5th Cir. 1989). The plaintiff's contention **[27]** that the jury award was grossly inadequate is based on the fact that the jury awarded him nothing for his personal pain and suffering. However, the court finds that the plaintiff's testimony on this point was less than compelling. Although the plaintiff testified that he had some pain for about three months after the accident, his injuries were not so bad that it would have been unreasonable for the jurors to conclude, as they apparently did, that the pain experienced by the plaintiff was so minor that it did not justify a damage award. The court cannot say that the jury's refusal to award damages for his pain and suffering raises an irresistible inference that some improper cause invaded the trial.

The next ground for new trial raised by the plaintiff is that the answers given to the two subparts of special interrogatory number 4 were inconsistent. This case was submitted to the jury on special interrogatories. Interrogatory 4 asked:

> Do you find that the original injuries sustained by Elaine Munn combined with her unreasonable refusal of blood to cause her death? If your answer to this interrogatory is "Yes," what percentage did Elaine Munn's unreasonable refusal of blood contribute to her death?

The jury answered "yes" to the first subpart and 100 percent to the second. The plaintiff argues that these two answers are inconsistent and that this inconsistency shows that the jurors were either confused or acted out of prejudice. "If answers to jury interrogatories are in *irreconcilable conflict*, then the judge has no authority to enter judgment based upon those answers." *Brunner v. Maritime Overseas Corp.*, 779 F.2d 296, 297 (5th Cir. 1986) (emphasis

added). When faced with an apparent inconsistency in answers on motion for new trial made after the jury has been discharged, the court is "required under the Seventh Amendment to make a concerted effort to reconcile apparent inconsistencies in answers to special verdicts if at all possible."[7] *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1040 (5th Cir. 1982). In order to determine whether the answers to the two subparts of the interrogatory are in irreconcilable conflict, those answers must be viewed in light of the instructions given to the jury. The instruction which related to Interrogatory 4 told the jurors

> If you find that Elaine Munn would have lived had she accepted blood transfusions and that she unreasonably refused these transfusions under the circumstances, you still may award plaintiffs damages under the wrongful death statute if you find that the original injuries sustained by Elaine Munn combined with her unreasonable refusal of blood to cause her death. In that event, you must determine the percentage of wrongful death damages attributable to Elaine Munn's refusal to accept the transfusions. You have the discretion to place this percentage at 0%, 100%, or any percentage in between.

Under the instruction as given, the jurors were told that they could do exactly what they did. The instruction informs the jurors that if they found that the original injury was still an active causal agent at the time of Elaine Munn's death, then they were to apportion

7. If the plaintiff had raised the matter of inconsistent answers immediately upon the jury's returning its verdict the question could have been resolved by giving the jurors further instruction and returning them for further deliberation to clear up the apparent inconsistency. However, once judgment is entered on the jury's verdict, the rule stated here would apply.

wrongful death damages, not liability. The court must assume that the jurors paid heed to this instruction when they answered Interrogatory 4.

The court fully recognizes that the apportionment of damages rather than liability is a rather novel idea. However, this is consistent with the court's holding that the avoidable consequences defense goes to the question of the amount of damages which must be paid by the defendant and not to the question of causation. The jurors were clearly told that they were to determine what portion of the wrongful death damages should be borne by the plaintiff because of Mrs. Munn's unreasonable refusal to accept a blood transfusion and that they could place that figure at 100 percent even **[28]** if they determined that the defendant's negligence was a causal factor in the death of plaintiff's decedent. Although the interrogatory asked this question in a manner that was less than clear, the court is convinced that the jurors followed their instructions and that there is no irreconcilable conflict in the answers given to Interrogatory 4. The apparent conflict disappears when one realizes what the jury has determined is: although the defendant's negligence was a proximate cause of Elaine Munn's death, the plaintiff should bear the economic cost of that loss because it was 100 percent avoidable.

The plaintiff's next assignment of error concerns the court's refusal to instruct the jury that the reasonableness of Mrs. Munn's refusal of blood was to be determined by reference to a subjective standard. In short, the plaintiff asked the court to instruct the jury either directly that it was to consider what a reasonable Jehovah's Witness would have done in this situation or to instruct in such a way that the plaintiff could argue that the standard to be applied was that of the reasonable Jehovah's Witness. Once again, there is no

Mississippi case directly on point. However, the state supreme court has referred to the "familiar rule applicable to injuries generally, whether in tort or in contract, that the injured person shall use *reasonable* care and effort to prevent or minimize, the injury." *North American Accident Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528, 530 (1937) (emphasis added). The Fifth Circuit has stated that the doctrine of avoidable consequences applies "where the injured party has, subsequent to infliction of the harm, failed to exercise that degree of care society demands of the reasonable person." *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 932 (5th Cir. 1979). The generally accepted "test is, what would an ordinarily prudent man be expected to do under like circumstances." 25 C.J.S. Damages § 33 (1966). The standard is clearly an objective one, although the jury may be allowed to consider such circumstances as the knowledge possessed by the tort victim about the risks of the proposed treatment and the likelihood of success if the treatment was accepted. The jurors were also instructed in this case that they could consider Elaine Munn's religious beliefs as one of the surrounding circumstances which impacted on the reasonableness of her decision.

The plaintiff also argues that the court erred in refusing to instruct the jury that Elaine Munn's children would receive a pro rata share of any damages awarded for her wrongful death. An action may be brought under Mississippi's wrongful death statute by, among others, "the husband for the death of the wife", but any "damages for the injury and death of a married woman shall be equally distributed to the husband and children" regardless of who brings the suit. Miss. Code Ann. § 11-7-13 (1989 Supp.). Clearly the children of the deceased are entitled to share in any recovery under the statute. However, this does not mean that the jury must

be informed of that fact. The plaintiff has cited no authority to that effect; nor can this court think of any reason why the failure to instruct the jurors that the children would share in any award would result in any prejudice to the plaintiff's case. The lack of such knowledge would in no way effect the jurors' ability to determine whether any damages should be awarded and, if so, what the award should be.

The plaintiff further contends that a new trial is mandated because the court allowed counsel for the defendant to delve too deeply into the plaintiff's religious beliefs by asking questions which were designed to prejudice the jurors against the plaintiff because of those religious beliefs. The plaintiff refers specifically to questions concerning the Jehovah's Witness teachings that Jesus returned to Earth in 1914, that they should not salute the flag or serve in the armed forces. These questions were part of a series of questions which were aimed at determining whether the plaintiff and his wife sincerely held the beliefs which they claimed motivated their refusal of blood transfusions. The plaintiff contends that the defendant injected the element of religion in the case by raising **[29]** the defense of avoidable consequences. This is not exactly the case. When the defendant raised that defense, the plaintiff came forward with the explanation that the refusal to accept the recommended medical care was in keeping with the Munn's religious beliefs.[8] One of the questions for the jury was whether the Munn's profession of the Jehovah's Witness faith was sincere. The defendant was entitled to elicit from the plaintiff evidence which was relevant to this question.

8. This is not intended to state or imply that these were separate events which occurred in this chronological order.

In his motion for new trial, the plaintiff again raises the argument that the jury should have been instructed on the "eggshell skull" rule. This argument was fully discussed and rejected in the earlier opinion. *Munn*, 719 F. Supp. at 528-29. This rule is merely another way of stating the general rule that although the defendant is not liable for any physical problem that the plaintiff had prior to the defendant's act of negligence, he is liable for the exaggeration of that physical problem which is caused by his negligence, even if the exaggerated consequence was not foreseeable. The rule simply does not apply to a situation where, after the act of negligence has resulted in an injury, the plaintiff freely chooses to refuse recommended medical treatment, even though the disposition to make that choice pre-existed the act of negligence.

Another point raised in support of the new trial motion which was addressed in the earlier opinion is that the application of the doctrine of avoidable consequences in this case violated the Free Exercise Clause of the First Amendment. The court has nothing new to add to its prior discussion of this argument. *See Munn*, 719 F. Supp. at 529-30.

The final point raised by the plaintiff is that the defendant used all three of her peremptory challenges to exclude blacks from the jury. The plaintiff cites *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1988), as authority for the proposition that the use of peremptory challenges to exclude prospective jurors in a civil case because of their race violates the Equal Protection Clause of the Fourteenth Amendment. In *Edmonson*, a Fifth Circuit panel held that the Supreme Court's ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), applied to civil cases as well. Rehearing by the court sitting *en banc* was

promptly granted. *Edmonson*, 860 F.2d at 1317. However, no decision has yet been issued by the full court. Assuming, without deciding, that *Batson* does indeed apply in civil cases, this ground for new trial must fail as well, because the plaintiff failed to raise the issue in a timely manner. The court has carefully reviewed the transcript of the trial and finds that no objection was raised by the plaintiff when the defense made its peremptory strikes; nor did the plaintiff move to strike the jury panel or in any other way object to the seating of the panel at the time the jury was called, seated, and sworn in. The panel opinion in *Edmonson* clearly contemplates that the rules adopted by the courts in relation to a *Batson* challenge are to be followed in a civil case. The clear rule in this circuit, at least, is that a *Batson* challenge to the seating of a jury must be made promptly. *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir. 1986). In *Erwin*, the court held that the motion to strike was untimely when made before the jury was empaneled, but more than a week after the peremptory strikes had been made, and after the remaining veniremen had been released. In the case at bar, the challenge was raised for the first time after trial of the case on a motion for a new trial. Thus, the motion was clearly untimely.

Conclusion

For the above-listed reasons, the plaintiff's motion for a new trial will be denied. An appropriate order will be entered.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Ray James MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased, *Plaintiff*,

v.

SOUTHERN HEALTH PLAN, INC., d/b/a IPA Apple Plan, *Intervening Plaintiff*,

v.

Trudy E. ALGEE, *Defendant*.

No. DC87-124-S-O
Aug. 14, 1989.
[719 F. Supp. 525]

Phil Zerilla, Jr., Memphis, Tenn., for plaintiff.
John I. Houseal, Jr., Memphis, Tenn., for intervening plaintiff.
Gary K. Smith, Memphis, Tenn., for defendant.

[526] OPINION

SENTER, Chief Judge.

This wrongful death case presents some of the most difficult questions which this court has ever been asked to resolve. The case arose from an automobile accident which the defendant admits resulted from her negligence in attempting to pass another vehicle in

dense fog. The plaintiff's wife was severely injured as a result of the collision and died approximately two hours after the accident. The problem arises because the plaintiff and his wife, both adherents to the Jehovah's Witness faith, refused on religious grounds to allow the doctors who were treating Mrs. Munn to administer a blood transfusion which the defendant contends would have saved her life.

The defendant seeks summary judgment to the effect that if the jury should find, for whatever reason, that she is not liable for damages for Mrs. Munn's death, then the plaintiff is not entitled to recover for any prospective harm beyond the point of Mrs. Munn's death. Because the answer to this question depends, at least in part, upon the legal doctrine which is to be applied to **[527]** the facts of this case, the court will begin by attempting to resolve that issue.

The defendant has raised three theories which she insists apply under the facts of this case to bar, at least in part, the plaintiff's recovery. These are contributory negligence, assumption of the risk, and the doctrine of avoidable consequences. Only the latter of these clearly applies to the facts of this case.

The doctrine of avoidable consequences, sometimes referred to as the duty of the plaintiff to mitigate damages, "functions as a negative rule, denying an injured person recovery of damages for any reasonably avoidable consequences of the injury." 2 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, Damages in Tort Actions § 16.00 (1989). The basic rule is that the plaintiff may not recover from the defendant for injuries which flow from the defendant's wrongful conduct but which could have been avoided by the plaintiff's availing herself of reasonable measures to limit the harm. Simply stated, once the injury has occurred, the plaintiff may

not stand idly by and allow her damages to accumulate when she could take reasonable steps to minimize them.

> The doctrine of avoidable consequences comes into play only after the defendant has committed the wrongful act, but at a time when the plaintiff still has an opportunity to avoid the consequences in whole or in part. . . . The doctrine is often referred to as the plaintiff's duty to mitigate damages, but such reference lacks legal precision and can lead to confusion with other concepts in the law of damages. The doctrine of avoidable consequences should not be confused with the doctrine of contributory negligence. The latter focuses on issues of proximate causation of, and ultimate liability for, an accident, whereas the former focuses only on measurement of damages resulting from the injury-producing event.

Id.

The distinction noted above makes it clear that the present case is not one where the doctrine of contributory negligence should be applied. There has been no allegation that any action or inaction of Mrs. Munn was causally related to the accident which resulted in her injuries. The decision not to accept a blood transfusion was made after the defendant's wrongful conduct had already resulted in severe injury to Mrs. Munn. However, that decision may have resulted in an avoidable aggravation of the injury. This distinction between the doctrines of avoidable consequences and contributory negligence based on when the allegedly unreasonable conduct of the plaintiff occurred is widely recognized.

> Generally, the consequences of contributory negligence and avoidable consequences occur—if at all—at different times. Contributory negligence occurs either before or at the time

> of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant.

22 Am. Jur. 2d § 497 (Revised ed. 1988). The distinction has been noted by the Mississippi Supreme Court. *See Yazoo & M.V.R. Co. v. Fields*, 188 Miss. 725, 195 So. 489, 490 (1940).

The other theory raised by the defendant is that by refusing the transfusion, Mrs. Munn assumed the risk of her own death. The doctrine of assumption of the risk provides that a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. Restatement (Second) of Torts § 496A. At first glance, this doctrine appears to be applicable to the facts of this case. However, a closer study of the doctrine suggests that it may not be applicable. As stated by the Mississippi Supreme Court,

> Broadly speaking: ". . . [A]ssumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known *risk arising from what the defendant is to do or leave undone.*"

Shurley v. Hoskins, 271 So. 2d 439, 443 (Miss. 1973) (quoting Prosser, Handbook of **[528]** the Law of Torts, § 68 p. 440 (4th ed. 1971)). (Emphasis added.)

As this passage makes clear, the risk that is being assumed is the known risk that the defendant does not intend to act, or has already failed to act, in accordance with a duty imposed on him by law. "The result is that the defendant is relieved of all legal duty to the plaintiff; and being under no duty, he cannot be charged with

negligence." Prosser, § 440. In the instant case, by assuming the risk that she would die if she did not agree to a blood transfusion, Mrs. Munn did not relieve the defendant of any duty because the defendant had no duty in relation to the transfusion.

Both parties have directed the court's attention to *Shorter v. Drury*, 103 Wash. 2d 645, 695 P.2d 116 (1985). In that case, the plaintiff's wife had entered the hospital for Dr. Drury to perform a dilation and curettage procedure. Prior to the surgery, the Shorters discussed the procedure chosen with Dr. Drury, who explained that there could be complications including the loss of blood. The Shorters then told Dr. Drury that they were Jehovah's Witnesses and that their religious beliefs would not permit Mrs. Shorter to accept a blood transfusion. For this reason, Dr. Drury had the Shorters sign a document expressly refusing to permit him to administer a blood transfusion and releasing him from any liability for failing to give her a transfusion should the need arise. During the performance of the D & C, Dr. Drury severely perforated Mrs. Shorter's uterus causing serious blood loss. Other surgeons then took over. They informed both of the Shorters that Mrs. Shorter would almost surely die if she continued to refuse to allow a transfusion. The Shorters remained steadfast in their refusal, and Mrs. Shorter bled to death. Mr. Shorter then filed a wrongful death action against Dr. Drury. Following trial, the jury found Dr. Drury liable for malpractice, but reduced the damages by 75 percent due to the fact that the Shorters had voluntarily assumed the risk of Mrs. Shorter's bleeding to death.[1]

1. Apparently, following the adoption of the comparative negligence standard in Washington, the courts of that state started applying a formula for reducing damages based on comparative fault in assumption of the risk cases as well.

Although the court applied the doctrine of assumption of the risk in *Shorter*, that case is clearly distinguishable from the case at bar. In *Shorter*, the defendant was the doctor who performed the surgical procedure. Dr. Drury owed Mrs. Shorter a duty to use the knowledge, skills, and abilities of an average physician in performing the D & C. This duty would have included the obligation to administer a blood transfusion to keep his patient from bleeding to death if the need arose. When the Shorters signed the refusal form, they expressly assumed the risk of any harm which might result from Dr. Drury's failure to fulfill this duty and thereby relieved the doctor of that duty. In the present case, although it may be said that the Munns assumed the risk of any harm which might result from the refusal of the transfusion, that refusal enured to the benefit of the doctors performing the surgery who had a duty in relation to the transfusion, not to the benefit of Ms. Algee who had no duty in regard to the transfusion from which she could be released.

In an earlier motion for summary judgment, the plaintiff raised two issues in relation to the defense based on the doctrine of avoidable consequences which were not addressed by the court in its order denying the motion. Those issues need to be addressed prior to trial and both are relevant to the issue currently before the court. First, the plaintiff contends that the egg-shell or thin skull rule should be applied in this case. The "rule" is actually an exception to the more general rule that a defendant is liable only for those

Mississippi has not done so. *See Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947) (recognizing assumption of the risk as a complete defense although Mississippi was at that time a pure comparative negligence state). (Cf. *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973) (holding that where assumption of risk and contributory negligence doctrines overlap, contributory negligence instruction should be given.))

consequences which were the reasonably foreseeable results **[529]** of an anticipated action. As stated by Prosser, a "defendant is held liable when his negligence operates upon a concealed *physical* condition, such as pregnancy, or a latent disease, or susceptibility to disease, to produce consequences which he could not reasonably anticipate." Prosser, Handbook of the Law of Torts § 43, p. 261 (4th ed. 1971) (emphasis added). The statement of the rule in the Restatement is much the same:

> The negligent actor is subject to liability for harm to another although a *physical condition* of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

Restatement (2d) Torts § 461. (Emphasis added.) *See also* 22 Am. Jur. 2d § 281 (1988) (defendant liable "even if a particular injury may have been aggravated by . . . the peculiar physical condition of the injured person.").

Every authority which this court can find which states the "eggshell skull rule" speaks only of physical conditions which pre-exist the injury for which compensation is sought and lead to unforeseeably severe results. The religious beliefs of the plaintiff simply are not covered by this rule.

The plaintiff also presses a first amendment argument. This argument is not fleshed out and relies entirely on cases where a state attempted to force a Jehovah's Witness to accept a blood transfusion. There is a clear distinction, however, between the overt attempt by a state actor to force an individual to take some action which her religion forbids her to take and the application of a universally

applied tort doctrine which leaves the person "free to make [her] choice between the practice of [her] religion and the acceptance of treatment that may be contrary thereto." *Martin v. Industrial Accident Commission*, 147 Cal. App. 2d 137, 304 P.2d 828, 831 (1956) (upholding denial of worker's comp. death benefits where death was found to be result of refusal of transfusion on religious grounds). An individual has a right under the first amendment to hold religious beliefs and live by them, but that does not mean that anyone who commits a tort against that individual must suffer the consequences of decisions made by the victim based upon those religious beliefs.

It has been argued that persons who refuse medical treatment on religious grounds should be exempted on first amendment grounds from the operation of the doctrine of avoidable consequences. Comment, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 Yale L.J. 1466 (1978). The author contends that the application of this facially neutral doctrine to a tort victim who refuses medical treatment for religious reasons is a denial of a state benefit on religious grounds. The argument is basically that putting the tort victim to the choice of acting in violation of his religious beliefs or losing the right conferred by state law to obtain complete recovery for all harm which results from the wrongful conduct of another places an undue burden on the victim's free exercise rights. Cited in support of this argument are *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). *Sherbert* involved the denial of state unemployment benefits to a woman who refused on religious grounds to accept a job which required her to work on Saturday. The Court held that this was an impermissible burden on her free exercise rights. In *Yoder*, the

Court held that a state mandatory school attendance law violated the free exercise rights of people of the Amish faith. Each of these cases involves direct state action. If an exception to the doctrine of avoidable consequences is made for those who refuse medical treatment on religious grounds, payment for the harm which could have been avoided will come from the pockets of the tortfeasor, not from the coffers of the state. To adopt an absolute rule which required one citizen to pay damages for the consequences of another's exercising her religious freedom would favor an establishment of religion in a way which seems constitutionally unsupportable. **[530]** Additionally, the doctrine of avoidable consequences does not automatically bar the plaintiff from recovering the losses sustained after the refusal of medical treatment; it bars recovery of those losses only when the refusal is found to be unreasonable under all of the circumstances known to the tort victim at the time of the refusal. In what has come to be considered as the leading case on this point, the Connecticutt [sic] Supreme Court upheld the lower court's decision to submit the question of the objective reasonableness of the plaintiff's refusal of medical treatment to the jury with the instruction that the jurors were to consider the fact that the refusal was based on religious belief as one of the circumstances. *Lange v. Hoyt*, 114 Conn. 590, 159 A. 575 (1932). *See also Christiansen v. Hollings*, 44 Cal. App. 2d 332, 112 P.2d 723 (1941). The author of the comment also takes exception to this procedure, arguing that the jury is, in effect, being asked to pass upon the reasonableness of the plaintiff's religious belief. This indeed presents a problem. However, neither of the parties have adequately addressed this issue, so the court will delay any attempt to resolve it until the parties may be heard at the jury instruction conference after the evidence is in.

The court holds that the doctrine of avoidable consequences is the appropriate standard to be applied in this case and that its application does not violate the first amendment.

Application of the Doctrine of
Avoidable Consequences in a Wrongful Death Case

As stated earlier, the doctrine of avoidable consequences prevents the plaintiff from recovering for that part of her injury which could have been avoided by taking reasonable steps after the injury occurred.[2] How does this rule operate when the harm which the defendant contends was avoidable is death?

Neither party has presented the court with a single authority on this point, nor has exhaustive research turned up a single case where any court has addressed the issues presented by this case. Simply stated, the question is: if the jury should find that the refusal of the blood transfusion was unreasonable and that Mrs. Munn would have lived had she taken the transfusion, then what damages may the plaintiff recover.

The defendant's argument is that if the jury makes this dual finding, then there is no wrongful death and the plaintiff's cause of action is under the survival statute. From a purely technical standpoint, this is a compelling argument. At common law, "if a tortfeasor killed a man, neither the victim's losses before his death

2. Several courts have expanded the doctrine to include measures which if taken prior to the injury would have lessened the severity of the injury. The most common example is the application of the doctrine in cases where the injury resulting from an auto accident was aggravated by the plaintiff's failure to use a seat belt.

nor the losses to his survivors caused by his death were compensable." Dobbs, Handbook on the Law of Remedies, § 8.2, p. 552 (1973). Because the statutes which have been passed to abrogate this rule are in derogation of the common law, they must be strictly construed. *Durham v. Durham*, 227 Miss. 76, 85 So. 2d 807, 809 (1956). If recovery is not expressly provided for in either the wrongful death or survival statute, then there can be no recovery for the losses suffered by either the survivors or the estate. Given this backdrop, if Mrs. Dunn's [sic] refusal to accept the transfusion is seen as cutting off the defendant's liability for her death, then the plaintiff must fall back on the Mississippi Survival Statute, Miss. Code Ann. § 91-7-233 (1972). *See Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935) (where death was not proximately caused by wrongful act of defendant, any recovery for decedent's pain and suffering between commission of tort and death must be had, if at all, under survival statute).

Section 91-7-233 provides:

> Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, **[531]** at law or in equity, which the testator or intestate might have commenced and prosecuted.

Mrs. Munn could clearly have commenced an action against Ms. Algee to recover for the injuries she sustained as a result of Ms. Algee's wrongful conduct. Included in her recovery, if any, would have been prospective relief for the future effects of the injuries which were received in the accident, such as lost income, future pain and suffering, and future medical expenses. However, in the usual survival action, the calculation of these damages is based, not upon a mortality table, but upon the actual date of the tort victim's death.

In survival actions, "damages must of course be based upon the known period of life, and no recovery may be had for any prospective loss of earnings, expenses, or suffering based upon any probable life expectancy of the deceased, such as would be appropriate if the deceased were prosecuting the case in his lifetime." McCormick, *Damages*, 337-38 (1935). This rule clearly applies where the death results from an intervening cause which is deemed sufficient to break the causal connection between the tort and the death; but it is not so clear that it applies in this case.

In the usual personal injury case, in addition to the action under the survival statute, the plaintiff, as the husband of the decedent, would have a claim for his own losses which were caused by the injury to his wife—i.e., loss of services, loss of consortium, etc. This claim could be brought "at common law without the aid of statute." *Berryhill*, 158 So. at 471 (*citing Natchez, Jackson and Columbus Railroad Co. v. Cook*, 63 Miss. 38 (1885)). However, once again, recovery could be had only for the losses incurred by the plaintiff during the time period between the commission of the tort and the death of Mrs. Munn, if the damages resulting from the death are not attributable to the defendant.

The plaintiff counters with the argument that a straightforward application of the doctrine of avoidable consequences would allow him, both on his own behalf and on behalf of the decedent's estate, to recover damages for any harm which could not have been avoided by allowing the transfusion. A perfunctory reading of the rule, as generally stated, supports this argument. Generally, it is said that the plaintiff may recover for the harm which resulted from the defendant's wrongful act and which could not have been avoided by the plaintiff's acting reasonably after the injury has occurred.

The plaintiff alleges that his wife suffered severe physical injury, including a broken pelvis, broken ribs, a punctured and collapsed lung, and a severed artery, which would have resulted in long term disability, pain and suffering, and future medical expenses if she had survived. These consequences could not have been avoided by allowing the transfusion and, therefore, should be recoverable. On a purely emotional level, this argument is appealing; however, any attempt to ground such a holding on legal principles is thwarted by the stark reality that these consequences were never actually suffered by the plaintiff's decedent. This court can find no authority for allowing recovery of purely hypothetical losses.

The argument for recovery of damages for injuries to Mr. Munn which were actually suffered as a result of the death, at least to the extent that they would have occurred even if the plaintiff had taken the transfusion and survived, does not share this infirmity. Clearly, given the extent of the decedent's injuries, if she had lived, there would have been some loss of consortium and services to her husband and quite possibly lost earnings which under this argument ought now to be recoverable by her estate. There are serious problems with allowing recovery of damages for these elements of the loss. Whether the problem is addressed in terms of proximate cause[3] or simply in terms of a public policy **[532]** against allowing

3. There has been great debate among the commentators on the question whether the plaintiff's failure to take reasonable steps to avoid the consequences of an injury acts as an intervening cause so that the defendant's original act of negligence may no longer be viewed as the proximate cause of the avoidable injury, even though it is clearly an actual, contributing cause. The earlier authorities stated as a rule that "[w]here a plaintiff could have avoided the injurious consequences of defendant's wrong, his negligence in failing to do so is regarded as the proximate cause of the damages, and the original fault is

recovery from this defendant for consequences which the plaintiff could have avoided matters little. The doctrine of avoidable consequences operates to relieve the defendant of any legal obligation to pay damages for harm which the victim of her wrongful act could have avoided. The damages which the plaintiff seeks to recover did not occur as a result of the personal injuries suffered by the decedent but as a result of Mrs. Munn's death—a death for which the defendant has no legal obligation to pay damages if the jury should find that the death was avoidable and that the refusal of the transfusion was unreasonable.

CONCLUSION

The court holds that the doctrine of avoidable consequences is the appropriate standard to be applied in this case and that its application does not violate the plaintiff's first amendment rights. The court further holds that this question should be submitted to the jury through an appropriate instruction telling the jurors that they may consider the fact that it was based on religious belief. The court also holds that the plaintiff may not recover for purely hypothetical injuries which never occurred because of her death if

remote." Cooley, Hale on Damages, p. 91 (2d ed.1912); *see also* 1 Sedgwick, Elements of the Law of Damages, p. 73 (1912). This reasoning has been seriously criticized in more recent times and was flatly rejected by the drafters of the Second Restatement of Torts. Restatement (2d) of the Law of Torts, § 918 Comment (a) (in cases covered by § 918 on avoidable consequences, "it is not true . . . that the conduct of the tortfeasor ceases to be a legal cause of the ultimate harm."). The more recent authorities ground the rule in a public policy that a plaintiff "should not be permitted to inflict injury on another person, even a tortfeasor, by making him pay for the consequences of" the plaintiff's decision. Stein: Damages and Recovery: Personal Injury and Death Actions, § 126 (1972). *See also* McCormick, Handbook on the Law of Damages § 33 (1935).

the jury should find that the refusal of the transfusion was unreasonable and that the decedent would have survived had she taken the transfusion; nor may he recover for the harm actually suffered which resulted from his wife's death even though it would have been suffered to some extent even if she had taken the transfusion and lived.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the court for consideration of the defendant's motion for partial summary judgment. In this motion, the defendant asks the court to rule that in the event the jury should find that the plaintiff's decedent acted unreasonably in refusing a blood transfusion and that her death would have been avoided if she had accepted the transfusion, then the plaintiff is not entitled to recover damages for any loss which would have occurred had the decedent accepted the transfusion and lived. For reasons fully set forth in an accompanying opinion, the court finds that the motion is well taken.

Therefore, IT IS ORDERED:

That the defendant's motion for partial summary judgment is granted.